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No. 99-___

In The

Supreme Court of the United States

GEORGE MASON UNIVERSITY,

Petitioner,

v.

UNITED STATES OF AMERICA and
ANNETTE GRECO LITMAN,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May Congress require a State to waive its sovereign immunity as a condition of receiving federal funds?

PARTIES TO THE PROCEEDINGS

The Petitioner is George Mason University, a public university of the Commonwealth of Virginia located in Fairfax, Virginia. The Respondents are the United States of America, which intervened in the U.S. District Court for the purpose of defending the federal constitutionality of 42 U.S.C. § 2000d-7(a)(1), and Ms. Annette Greco Litman, who filed suit against George Mason University and other defendants in the U.S. District Court. Because this proceeding is essentially a conflict between the Commonwealth of Virginia and the United States over the scope of the powers of Congress and not a conflict over Ms. Litman's allegations against the University, the United States is listed first in the caption. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* § 6.18 (7th ed. 1993) (caption should be accurate portrayal of the adversary position of the parties).

Dr. Eugene M. Norris is a defendant in the action in the U.S. District Court. With the agreement of Ms. Litman, the claims against him have been held in abeyance. Dr. Geoffrey Orsak was a defendant in the U.S. District Court. However, all claims against him have been dismissed. Mr. Girard Mulherin was also a defendant in the U.S. District Court. The U.S. District Court entered summary judgment in his favor. Dr. Norris, Dr. Orsak, and Mr. Mulherin were not parties in the U.S. Court of Appeals for the Fourth Circuit and are not parties to the proceedings in this Court.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceedings ii

Table of Authorities iv

Opinion Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved in this Case 2

Statement of the Case 3

A. Factual Background 5

B. Procedural Background 6

Reasons for Granting the Petition 10

I. The Conflict Between the Courts of Appeal Demands Review by This Court 11

II. The Issue of Whether Congress Can Use the Spending Clause Power to Require Waiver of a State's Sovereign Immunity Warrants Review by This Court 20

III. There Is No Alternative Basis For The Lower Court's Judgment 26

Conclusion 29

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine,
119 S. Ct. 2240 (1999) 3, 20, 21, 23

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) 12

Blatchford v. Native Village of Noatak,
501 U.S. 775 (1991) 21

Bradley v. Arkansas,
___ F.3d ___, 1999 WL 673228 (8th Cir. 1999) ..passim

City of Boerne v. Flores,
521 U.S. 507 (1997) 8

Clark v. California,
123 F.3d 1267 (9th Cir. 1997),
cert. denied sub nom. Wilson v. Armstrong,
118 S. Ct. 2340 (1998) 28

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,
119 S. Ct. 2219 (1999) .....passim

Coyle v. Smith,
221 U.S. 559 (1911) 20

Crawford v. Davis,
109 F.3d 1281 (8th Cir. 1997) 28

Davis v. Monroe County Bd. of Educ.,
119 S. Ct. 1661 (1999) 4

Doe v. University of Illinois,
138 F.3d 653 (7th Cir. 1998),
vacated and remanded, 119 S. Ct. 2016 (1999) 28

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,
119 S. Ct. 2199 (1999) .....passim

TABLE OF AUTHORITIES – Continued

Page

Ford Motor Co. v. Department of the Treasury,
323 U.S. 459 (1945) 15

Franks v. Kentucky Sch. for the Deaf,
142 F.3d 360 (6th Cir. 1998) 28

Frost & Frost Trucking Co. v. Railroad Comm'n,
271 U.S. 583 (1926) 25

Gebser v. Lago Vista Indep. Sch. Dist.,
118 S. Ct. 1989 (1998) 7

Gregory v. Ashcroft,
501 U.S. 452 (1991) 21

Kadiki v. Virginia Commonwealth Univ.,
892 F. Supp. 746 (E.D. Va. 1995) 7

Lane v. Peña,
518 U.S. 187 (1996) 4

Lehman v. Lycoming County Children's Services Agency,
458 U.S. 502 (1982) 10

Lesage v. Texas,
158 F.3d 213 (5th Cir. 1998),
petition for cert. filed, 67 U.S.L.W. 3469
(Jan. 11, 1999) (No. 98-1111) 27, 28

Litman v. George Mason University,
___ F.3d ___ (4th Cir. 1999) .....passim

Litman v. George Mason University,
5 F. Supp. 2d 366 (E.D. Va. 1998) 1, 8

Little Rock Sch. Dist. v. Mauney,
183 F.3d 816 (8th Cir. 1999) 15, 28

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 24

TABLE OF AUTHORITIES – Continued

Page

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 24

New York v. United States,
505 U.S. 144 (1992) 2, 21, 25

Payne v. Tennessee,
498 U.S. 1076 (1991) 29

Pennhurst State School and Hosp. v. Halderman,
451 U.S. 1 (1981) 12

Preston v. Virginia ex rel. New River Community College,
31 F.3d 203 (4th Cir. 1994) 7

Printz v. United States,
521 U.S. 898 (1997) 2, 21

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,
506 U.S. 139 (1993) 9

Richard Anderson Photography v. Brown,
852 F.2d 114 (4th Cir. 1988) 3

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 8, 23, 24

South Dakota v. Dole,
483 U.S. 203 (1987) ..... passim

United States v. Butler,
297 U.S. 1 (1936) 4, 17

United States v. Lopez,
514 U.S. 549 (1995) 10, 25

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8 ..... passim

U.S. Const. art. I, § 8, cl. 1 ..... passim

U.S. Const. amend. X ..... passim

U.S. Const. amend. XI ..... passim

U.S. Const. amend. XIV, § 5 ..... 27, 29

STATUTES

20 U.S.C. §§ 1401-85 16

20 U.S.C. §§ 1403 and 1415 ..... 16, 20

20 U.S.C. §§ 1681-88 7

20 U.S.C. § 1687 15

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 7

28 U.S.C. § 2403(a) 8

29 U.S.C. § 794(a) ..... passim

42 U.S.C. § 1983 6

42 U.S.C. § 2000d-7(a) (1) ..... passim

42 U.S.C. § 6107 3

RULES

Sup. Ct. R. 14.1(g)(ii) 7

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911 (1995) 19

The Federalist No. 51 (James Madison) (Clinton Rossiter ed. 1961, 1999 prtg.) 21

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* (7th ed. 1993) ..... ii, 29

PETITION FOR WRIT OF CERTIORARI

George Mason University, by and through its counsel, the Attorney General of the Commonwealth of Virginia, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit is reported as *Litman v. George Mason University*, ___ F.3d ___ (4th Cir. 1999). It is reprinted in the Appendix to the Petition for Writ of Certiorari on pages 1-26. The opinion of the U.S. District Court for the Eastern District of Virginia, Alexandria Division, is reported as *Litman v. George Mason University*, 5 F. Supp. 2d 366 (E.D. Va. 1998). It is reprinted in the Appendix to the Petition for Writ of Certiorari on pages 27-55.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit was entered on July 28, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. The Spending Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 1, provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

2. The Tenth Amendment to the United States Constitution, U.S. Const. amend. X, provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1]

3. The Eleventh Amendment to the United States Constitution, U.S. Const. amend. XI, provides: "The judicial power of the United States shall not be construed to

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[1] The nature of the Tenth Amendment is clear. As this Court observed: "The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *New York v. United States*, 505 U.S. 144, 156-57 (1992). Moreover, the Tenth Amendment is not the exclusive textual source of protection for principles of federalism. *See Printz v. United States*, 521 U.S. 898, 953 n.13 (1997).

extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State."[2]

4. The federal statute at issue, 42 U.S.C. § 2000d-7(a)(1), provides: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of Section 504 of the Rehabilitation Act, Title IX of the Education Amendments of 1972, the Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statutes prohibiting discrimination by recipients of Federal financial assistance."

STATEMENT OF THE CASE

In 1787, George Mason refused to sign the United States Constitution because he feared that the proposed charter did not sufficiently restrain the National Government. In 1999, a public University named for George Mason asks this Court to delineate the Constitution's limits on the National Government vis-à-vis the States.[3]

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[2] While the Eleventh Amendment confirms the existence of the States' sovereign immunity, "the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999).

[3] George Mason University, like all state-supported institutions of higher education in Virginia, is the Commonwealth for purposes of sovereign immunity. *See Richard Anderson Photography v. Brown*, 852 F.2d 114 (4th Cir. 1988).

Specifically, the University asks this Court to determine whether Congress may use the Spending Clause "to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1677 (1999) (Kennedy, J., joined by Rehnquist, C.J., Scalia, and Thomas, JJ., dissenting). This issue is of enormous consequence. As Justice O'Connor observed, "[i]f the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' " *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., joined by Brennan, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)) (internal quotation marks original).

This question regarding the scope of Congress' power vis-à-vis the States centers on 42 U.S.C. § 2000d-7(a)(1). That statute requires a State to waive its sovereign immunity from private actions to recover money damages for violations of certain federal laws as a condition of receiving federal funds. *See Lane v. Peña*, 518 U.S. 187, 198 (1996). The issue in this proceeding is whether Congress may constitutionally impose such a requirement on the States.

A. FACTUAL BACKGROUND

This conflict between the University and the United States over the powers of the National Government arises out of Annette Greco Litman's allegations that the University violated federal law. Ms. Litman took several courses in the University's "extended studies" program. In the autumn of 1995, she enrolled in a computer science class taught by Dr. Eugene Norris. Shortly thereafter, Ms. Litman also accepted a position as Dr. Norris' research assistant. During the period while she was Dr. Norris' student and research assistant, Ms. Litman alleges that Dr. Norris engaged in sexual harassment of her.[4] Ms. Litman did not report any of this alleged sexual harassment to the University.

In January 1996, Ms. Litman ended her research position with Dr. Norris. Nevertheless, Ms. Litman claims that Dr. Norris continued to bother her.[5] On February 15, 1996, Ms. Litman filed a sexual harassment complaint against Dr. Norris with the University Equity Office.[6] On

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[4] Ms. Litman claims that the sexual harassment began with Dr. Norris paying extra attention to her and sitting close to her, and escalated to the point that, when they would have lunch together, Dr. Norris initiated intimate conversations. Ms. Litman claims that this culminated, in November 1995, in Dr. Norris' telling her that he was falling in love with her.

[5] After Ms. Litman resigned as his research assistant, Dr. Norris allegedly sent Ms. Litman an e-mail suggesting that she should marry him. Dr. Norris also allegedly obtained Ms. Litman's schedule and showed up outside classrooms where he knew that she would be present.

[6] The University Equity Office immediately contacted Dr. Norris and asked him to cease contact with Ms. Litman. Dr.

October 7, 1996, a faculty disciplinary panel heard Ms. Litman's complaint against Dr. Norris.[7] The disciplinary panel found that Dr. Norris had not violated the University's sexual harassment policy, but had failed to live up to University "standards" related to that policy. Disciplinary sanctions were not imposed against Dr. Norris.

B. PROCEDURAL BACKGROUND

On October 31, 1997, Litman filed suit in the U.S. District Court for the Eastern District of Virginia, Alexandria Division. Although Ms. Litman sued the University and three individuals under a variety of theories,[8]

Norris agreed. Having stopped the alleged harassment, the Equity Office regarded the matter as closed. Ms. Litman regarded this result as unsatisfactory and initially urged that her complaint be investigated and that Dr. Norris be disciplined. Ms. Litman later dropped this demand, but in late April renewed it. The Equity Office subsequently investigated the matter.

[7] In May 1996, two faculty members, Dr. Geoffrey Orsak and Dr. Bernd-Peter Paris, filed a complaint against Ms. Litman in the Equity Office. The faculty members alleged that Ms. Litman had been sexually harassing them. Ms. Litman was found guilty. She was barred from taking any other extended studies courses, academic sanctions were imposed regarding her incomplete grades, and she was forbidden to enter any University campus or to speak with any of the faculty involved.

[8] Ms. Litman sued Dr. Norris for violation of 42 U.S.C. § 1983 and the state law tort of intentional infliction of emotional distress. Those claims are still pending, but have been stayed pending the resolution of the sovereign immunity issue.

In addition, Ms. Litman sued the University, Dr. Geoffrey Orsak, one of the faculty members who had accused her of sexual harassment, and Dean Mulherin, the administrator in

her primary claim against the University was a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88.[9] Ms. Litman invoked jurisdiction pursuant to 28 U.S.C. § 1331 (general federal question).[10]

The University moved to dismiss on sovereign immunity grounds.[11] Although Congress, by enacting

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charge of student disciplinary proceedings, alleging various constitutional violations related to the disciplinary hearings against her. All of those claims, except one claim against Dean Mulherin, were dismissed in January 1998. The U.S. District Court granted Dean Mulherin's Motion for Summary Judgment in May 1998.

[9] Ms. Litman brought two separate Title IX claims. First, because a University employee, Dr. Norris, allegedly harassed her, she claimed that the University had violated Title IX. Second, because other University employees brought disciplinary charges against her and otherwise allegedly treated her badly, she asserts that the University has violated Title IX.

[10] This statement is intended to meet the requirements of Sup. Ct. R. 14.1(g)(ii) concerning federal jurisdiction in the first instance.

[11] At the time of the U.S. District Court proceedings, this Court had not yet decided *Gebser Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). If the deliberate indifference standard of *Gebser* had been applied to Ms. Litman's Complaint, the Complaint likely would have been dismissed for failure to state a claim. However, at the time of the U.S. District Court proceedings, the law in the Fourth Circuit was that educational institutions were liable under Title IX for their employee's acts of sexual harassment. *See Preston v. Virginia ex rel. New River Community College*, 31 F.3d 203, 207 (4th Cir. 1994) ("Title VII, and the judicial interpretations of it, provides a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX"); *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 754 (E.D. Va. 1995).

§ 2000d-7, clearly attempted to abrogate sovereign immunity for Title IX claims, the University, relying on this Court's decisions in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), contended that this attempt at abrogation was unconstitutional. Because the University was contending that an Act of Congress was unconstitutional, the District Court, pursuant to 28 U.S.C. § 2403(a), notified the Attorney General of the United States and allowed the United States to intervene in the matter to defend the constitutionality of § 2000d-7.

The District Court agreed with the University and held that 42 U.S.C. § 2000d-7(a)(1) was unconstitutional to the extent that it purported to *abrogate* sovereign immunity for certain federal statutes. Pet. App. at 43. However, the District Court went on to hold that § 2000d-7(a)(1) required waiver of sovereign immunity as a condition of receiving federal funds. The District Court reasoned that while "Congress does not have the authority pursuant to its Article I powers to simply *abrogate* the States' Eleventh Amendment immunity, Congress does have the power to require the States to *waive* their immunity pursuant to a valid exercise of its spending power." Pet. App. at 45. The District Court also emphasized that the State's sovereign immunity presented no "independent constitutional bar" to Congress' employing its spending power in this manner. Pet. App. at 48 (internal quotation marks omitted).

On appeal, the Fourth Circuit did not address whether Congress' attempt to abrogate sovereign

immunity is constitutional.[12] Instead, it focused exclusively on the waiver issue. After concluding that § 2000d-7 required the States to waive their sovereign immunity, the Fourth Circuit then turned to the issue of whether Congress could impose such a condition. The Fourth Circuit's analysis of the issue is brief. In its entirety, the analysis reads as follows:

> [The University's] second argument, that Congress cannot employ its spending power in a manner that conditions a state's receipt of funding upon a waiver of Eleventh Amendment immunity, is also without merit under *current Supreme Court jurisprudence*. While the Supreme Court in [Dole] noted that the spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional," such as conditioning a grant of federal funds "on invidiously discriminatory state action or the infliction of cruel and unusual punishment," it stated that *the range of permissible conditions extended beyond the original enumerations of congressional power granted by the Constitution. Thus, while abrogating Eleventh Amendment immunity would be impossible unless exercised under the Fourteenth Amendment, conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity.* Thus, when a condition under the Spending Clause includes an unambiguous waiver of

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[12] Because a denial of sovereign immunity is considered a final judgment under the collateral order doctrine, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), the University was able to appeal immediately.

> Eleventh Amendment immunity, the condition is constitutionally permissible as long as it rests on the state's voluntary and knowing acceptance of it.

Pet. App. at 20-21 (emphasis added) (citations omitted). In sum, the Fourth Circuit characterized this Court's *current* Spending Clause jurisprudence as holding that Congress may use its Spending Clause power to achieve ends that it could not otherwise achieve using its other Article I powers. Therefore, under the Fourth Circuit's interpretation of *current* Spending Clause jurisprudence, Congress could require waiver of sovereign immunity as a condition of receiving federal funds.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted to resolve a conflict between the courts of appeal, *see Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 507 (1982), as well as to consider a question of exceptional importance concerning the scope of Congress' constitutional powers. *See United States v. Lopez*, 514 U.S. 549, 552 (1995).

First, there is a conflict between the courts of appeal. In the present case, the Fourth Circuit held that § 2000d-7 *is constitutional* to the extent that it requires a State to waive its sovereign immunity as a condition of receiving federal funds. In *Bradley v. Arkansas*, ___ F.3d ___, 1999 WL 673228 (8th Cir. 1999), the Eighth Circuit held that § 2000d-7 *is unconstitutional* to the extent that it requires a State to waive its sovereign immunity as a condition of receiving federal funds.

Second, the issue of whether Congress can use the Article I Spending Clause to require surrender of a State's sovereign immunity warrants immediate review by this Court. In our Union, sovereignty is divided between the States and the National Government. Among the attributes of sovereignty retained by the States is immunity from private party suits for damages. This Court has held that Congress may not use its Article I power to diminish the sovereign immunity of the States. Yet, according to the Fourth Circuit, Congress may use its Article I Spending Clause power to exact a waiver of sovereign immunity.

The issue cannot be avoided by relying on an alternative basis for the Fourth Circuit's judgment. Although the Respondents may contend that § 2000d-7 is a valid *abrogation* of sovereign immunity for various federal claims and, thus, that there is an alternative basis for holding that sovereign immunity does not apply, such a contention must be rejected. Under this Court's decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199, 2206-07 (1999), § 2000d-7 is unconstitutional to the extent that it purports to abrogate sovereign immunity for various federal claims.

I. THE CONFLICT BETWEEN THE COURTS OF APPEAL DEMANDS REVIEW BY THIS COURT.

There is a conflict between the courts of appeal. Both the Fourth Circuit and the Eighth Circuit have addressed the question of whether § 2000d-7 is constitutional to the extent that it requires a State to waive its sovereign

immunity as a condition of receiving federal funds. However, the two courts of appeal reached opposite results.

In this case, the Fourth Circuit concluded that § 2000d-7 *is constitutional* to the extent that it required waiver of sovereign immunity as a condition of receiving federal funds. The Fourth Circuit reasoned:

> [W]hile abrogating Eleventh Amendment immunity would be impossible unless exercised under the Fourteenth Amendment, conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity. Thus, when a condition under the Spending Clause includes an unambiguous waiver of Eleventh Amendment immunity, the condition is constitutionally permissible as long as it rests on the state's voluntary and knowing acceptance of it.

Pet. App. at 20-21. However, in *Bradley*, the Eighth Circuit concluded that § 2000d-7 is unconstitutional to the extent that it required waiver of sovereign immunity as a condition of receiving federal funds. The Eighth Circuit reasoned:

> We next consider whether Arkansas waived its Eleventh Amendment immunity with respect to claims arising under § 504 by accepting federal funds. Examining the Supreme Court's decisions in *Atascadero [State Hosp. v. Scanlon]* and *Pennhurst State School & Hospital v. Halderman*, we find three requirements that must be satisfied if a state's participation in a federal spending program is to be held to constitute a waiver of the state's Eleventh Amendment immunity against claims arising under that program. The

three requirements are: (1) the federal spending program must represent a valid exercise of Congress' spending power; (2) the statute creating the federal spending program must contain a clear, unambiguous warning that Congress intends to exact waiver of Eleventh Amendment immunity as a condition for participating in the program; and (3) the state must have participated in the federal spending program.

Section 504 fails the first requirement because it is not a valid exercise of Congress' spending power. *College Savings* recognizes that Congress may require states to comply with conditions to receive federal funds, including waiving their Eleventh Amendment immunity. *College Savings* warns, however, that "the financial inducements offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." There are also limitations on the conditions that Congress may impose on a state's receipt of federal funds. One of these limitations is that "conditions must . . . bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority."

Section 504 and its abrogation provision impose overly broad conditions on state agencies such as the [Arkansas Department of Education]. Section 504 prohibits "any program or activity receiving federal funding" from treating an individual differently "solely by reason of" that person's disabilities. "Program or activity" is defined broadly to include "all of the operations" of state departments, agencies, or instrumentalities. With these provisions, § 504

> mandates that Arkansas waive its Eleventh Amendment immunity to all claims arising under § 504 if it receives any federal funding, even funding unrelated to the state's obligations to comply with § 504 or the rest of the RA.
>
> Congress' imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion: Arkansas is forced to renounce all federal funding, including funding wholly unrelated to the RA, if it does not want to comply with § 504. Congressional imposition of such a condition does not give Arkansas, or any other state, a meaningful choice regarding whether to receive federal funding and waive its Eleventh Amendment immunity to suits arising under § 504 or reject funding and retain its Eleventh Amendment immunity to such suits.
>
> The condition § 504 imposes on recipients of federal funds exceeds the ordinary quid pro quo involved in a proper exercise of Congress' spending power. Therefore, § 504 is not a valid exercise of Congress' spending power, and Arkansas by receiving federal funds did not waive its Eleventh Amendment immunity to suits arising from alleged violations of § 504.

Bradley, ___ F.3d at ___, 1999 WL 673228 at *10-11 (citations omitted). In sum, the Eighth Circuit found that the waiver required by § 2000d-7 is too broad and, thus, unconstitutional. A State is forced to choose between waiving its sovereign immunity for claims under the Rehabilitation Act and losing all federal funds for all aspects of its operations including those aspects that are totally unrelated to compliance with the Rehabilitation Act. Such a condition amounts to nothing more than an

attempt to use the Spending Clause as a means of regulating the States.

Although the Eighth Circuit was evaluating § 2000d-7 in the context of the Rehabilitation Act, the analysis is the same for § 2000d-7 in the context of Title IX. Like the Rehabilitation Act, Title IX broadly defines "program or activity" to include "all of the operations" of a State's departments, agencies, or instrumentalities. *See* 20 U.S.C. § 1687. With these provisions, Title IX mandates that a State waive its sovereign immunity for all claims arising under Title IX if it receives *any* federal funding, even funding unrelated to the State's obligations to comply with Title IX. The imposition of such condition on a State exceeds Congress' powers under the Spending Clause.[13]

Of course, in *Bradley*, the Eighth Circuit, relying on its earlier opinion in *Little Rock Sch. Dist. v. Mauney*, 183

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[13] Because the University did not use the language of coercion in its briefs before the District Court and Fourth Circuit, the Respondents may well assert that the University cannot argue coercion before this Court. Such an assertion elevates semantics to substance and must be rejected. First, arguments regarding sovereign immunity can be raised at any stage of the proceedings. *See Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 467 (1945). Since the University could raise the sovereign immunity argument for the first time in proceedings before this Court, it is irrelevant what the University argued below with respect to sovereign immunity. Second, in both the District Court and the Fourth Circuit, the University explicitly argued that § 2000d-7 was unconstitutional to the extent that it required waiver of sovereign immunity as a condition of receiving federal funds. The University seeks to argue the same issue before this Court. The fact that the University's argument in this Court uses different rhetoric is inconsequential.

F.3d 816, 831-32 (8th Cir. 1999), also held that 20 U.S.C. §§ 1403 and 1415 require a State to waive its sovereign immunity as a condition of receiving federal funds under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1401-85, and that this requirement of a waiver is constitutional. *See Bradley*, ___ F.3d at ___, 1999 WL 673228 at *6. However, the Eighth Circuit's holding with respect to §§ 1403 and 1415 does not represent agreement with the Fourth Circuit's broad holding that Congress may require waiver of sovereign immunity as a condition of receiving federal funds. As the Eighth Circuit implicitly recognized, there is a fundamental difference between the waiver required by 20 U.S.C. §§ 1403 and 1415 and the waiver required by § 2000d-7. The waiver required by §§ 1403 and 1415 forces a State to choose between waiving its sovereign immunity for claims under a single federal statute, the IDEA, and foregoing funds to implement the IDEA. Thus, a State could refuse to waive its sovereign immunity for IDEA and still receive federal funds for all purposes other than the IDEA. There is a close nexus between the waiver of sovereign immunity for IDEA claims and the expenditure of IDEA funds. In contrast, the waiver required by § 2000d-7 forces a State to choose between waiving its sovereign immunity for all claims under a variety of federal statutes and foregoing federal funds for *all aspects of its operations*. Thus, if a State refuses to waive its sovereign immunity for a variety of federal anti-discrimination claims, it loses *all* federal funds for *all* programs including those totally unrelated to the enforcement of federal anti-discrimination law. There is no nexus between the waiver of sovereign immunity for various

federal anti-discrimination claims and all operations of a State. Such a requirement is nothing more than an attempt to regulate a State by forcing it to waive sovereign immunity.

This conflict between the courts of appeal can be resolved by limiting Congress' Spending Cause power vis-à-vis the States. In her *Dole* dissent, Justice O'Connor noted a fundamental difference between Congress imposing specific requirements on how money should be spent and Congress attempting to impose conditions that were only tangentially related to the expenditure of funds.[14] As Justice O'Connor observed:

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[14] *Dole* involved the issue of whether Congress could require the States to pass a law raising the drinking age to twenty-one as a condition of receiving federal funds. In upholding such a requirement, this Court expressly rejected the idea that the Constitution's structure limited the Spending Clause power vis-à-vis the States. *Dole*, 483 U.S. at 209-10.

To the extent it holds that the structure of the Constitution does not limit the exercise of the Spending Clause vis-à-vis the States, *Dole* should be limited. Instead, this Court should return to the general principles of *Butler*. In *Butler*, this Court held that the reach of the spending power "is not limited by the direct grants of legislative power found in the Constitution." *Butler*, 297 U.S. at 66. However, this Court also held that the application of the statute to the States violated the principles confirmed by the Tenth Amendment. *Id.* at 73. Thus, *Butler* recognized that the National Government has the power to achieve ends not explicitly articulated in Article I, but also recognized that the Constitution's structure limits Congress' Article I powers vis-à-vis the States. In her *Dole* dissent, Justice O'Connor laid the intellectual foundations for a return to the principles of *Butler*. *Dole*, 483 U.S. at 215-216 (O'Connor, J., joined by Brennan, J., dissenting).

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways – or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds supports § 158.

There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants. It is the line identified in the *Brief for the National Conference of State Legislatures et al. as Amici Curiae*:

> "Congress has the power to spend for the general welfare, it has the power to legislate only for delegated purposes. . . . *The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be*

> *spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent.* A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers."

Id. at 215-216 (O'Connor, J., joined by Brennan, J., dissenting) (emphasis added, citations omitted, block quotation original). *See also* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911, 1962-78 (1995) (further refining the distinction in Justice O'Connor's dissent). Thus, Congress may impose conditions that are closely related to the purpose of the expenditure, but may not impose conditions that are only tangentially related to the purpose of the expenditure. Under Justice O'Connor's analytical framework, the National Government could give money to a State for education and require that a State deliver educational services in a non-discriminatory manner. Such a condition is no different than requiring that federal highway funds be used to build a safe highway. However, under Justice O'Connor's analytical framework, Congress could not require a State to waive sovereign immunity for Title IX claims as a condition of receiving *any* federal money for *any* aspect of governmental operations.[15]

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[15] Moreover, requiring the States to waive their sovereign immunity as a condition of receiving federal funds is *never* constitutional. Immunity from suit by private parties is a

The conflict between the courts of appeal is clear and also has enormous implications for our federal system. The States in the Fourth Circuit face a difficult choice of either surrendering their sovereign immunity or giving up their share of the federal largess. The States in the Eighth Circuit face no such choice. In our Union where all States are on an equal footing, *see Coyle v. Smith*, 221 U.S. 559, 565 (1911), such inequality among the States cannot be tolerated. This Court must resolve the conflict. Accordingly, this Court should grant the Petition for a Writ of Certiorari.

II. THE ISSUE OF WHETHER CONGRESS CAN USE THE SPENDING CLAUSE POWER TO REQUIRE WAIVER OF A STATE'S SOVEREIGN IMMUNITY WARRANTS REVIEW BY THIS COURT.

Even if there were not a conflict between the courts of appeal, the issue of whether Congress can use the Article I Spending Clause to require surrender of a State's sovereign immunity demands immediate review by this Court.

"[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may

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fundamental aspect of sovereignty. *Alden v. Maine*, 119 S. Ct. 2241, 2246-47 (1999). In essence, a requirement that a State surrender a fundamental aspect of its sovereignty in order to receive federal funds is analogous to a requirement that an individual surrender a vital organ, such as a kidney, as a condition of receiving some public benefit. Quite simply, there are some things that cannot be surrendered through a contract. Consequently, the waiver of sovereign immunity required by §§ 1403 and 1415 is also unconstitutional.

resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). *See also The Federalist No. 51*, at 291 (James Madison) (Clinton Rossiter ed. 1961, 1999 prtg.) (suggesting that the National Government would control the States and the States would control the national government). When the States entered our Union, they did so as sovereign entities. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). Although the States surrendered many of their powers to the new National Government, they retained "a residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 918-19 (1997). The fact that the States retained sovereignty is reflected throughout the Constitution's text and the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones. *See id.* at 919. Thus, "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

Among the attributes of sovereignty retained by the States is immunity from suit for money damages by private parties. *See Alden v. Maine*, 119 S. Ct. 2240, 2246-47 (1999). The constitutional rationale for this preservation of sovereign immunity is clear:

> Underlying constitutional form are considerations of great substance. Private suits against nonconsenting States – especially suits for money damages – may threaten the financial integrity of the States. It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money

damages. Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. The potential national power would pose a severe and notorious danger to the States and their resources.

A congressional power to strip the States of their immunity from private suits . . . would pose more subtle risks as well. "The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government." When the States' immunity from private suits is disregarded, "the course of their public policy and the administration of their public affairs" may become "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." While the States have relinquished their immunity from suit in some special contexts – at least as a practical matter – this surrender carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States.

A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of the State may have a legitimate claim for compensation, other

> important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen. "It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place."

Id. at 2264-65 (citations omitted).

The decisions of this Court recognize the importance of sovereign immunity in our federal system. While Congress can abrogate the sovereign immunity of the States as a means of enforcing the Fourteenth Amendment, *see Florida Prepaid*, 119 S. Ct. at 2205-06 (1999), and while a State is always free to expressly waive its sovereign immunity, *see College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2223 (1999), Congress cannot use its Article I powers to diminish the sovereign immunity of the States. Indeed, this Court has explicitly held that Article I cannot be used to abrogate sovereign immunity, *see Seminole Tribe*, 517 U.S. at 72-73, or to exact constructive waivers of a State's sovereign immunity, *see College Savings Bank*, 119 S. Ct. at 2229.

Yet, despite the obvious importance of sovereign immunity in our constitutional system and despite this Court's decisions invalidating the National Government's

attempt to diminish sovereign immunity, the Fourth Circuit held that Congress could require the surrender of this fundamental aspect of sovereignty as the price of receiving federal funds. Notwithstanding the fact that this Court has stated that sovereign immunity "restricts the judicial power under Article III, and Article I cannot be used to circumvent limitations placed upon federal jurisdiction," *Seminole Tribe*, 517 U.S. at 72-73, the Fourth Circuit found that the Article I Spending Clause can be used to circumvent limitations upon federal jurisdiction. Although this Court has observed that "[r]ecognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*," *College Savings Bank*, 119 S. Ct. at 2229, the Fourth Circuit found a congressional power to exact express waivers of sovereign immunity through the exercise of an Article I power. In doing so, the Fourth Circuit not only undermined the holding of *Seminole Tribe*, it made it possible for Congress to eviscerate the holding of *Seminole Tribe* and all other decisions recognizing the structural constraints of our Constitution.

While such a broad view of the Spending Clause power may be consistent with *Dole*, it directly contradicts the principle that, under our Constitution, the National Government is one of enumerated, hence limited, powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). "[T]hat those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). If the Fourth Circuit is correct in its view of the breadth of Spending Clause

power, then "the spending power could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167.

Moreover, the Fourth Circuit's interpretation is contrary to the doctrine of unconstitutional conditions. Under that doctrine, the government may not require an individual to waive a constitutional right as a condition of receiving a public benefit. Quite simply, if government "may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may be thus manipulated out of existence." *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926). Similarly, in § 2000d-7, Congress is requiring a State to surrender a fundamental aspect of its sovereignty as a condition of receiving federal funds. If Congress may compel a State to surrender a fundamental aspect of its sovereignty as a condition of receiving federal funds, then it may also compel the surrender of all aspects of state sovereignty. It is inconceivable that the structural guarantees of federalism in our Constitution may be manipulated out of existence.

The issue of whether Congress may require a State to waive its sovereign immunity as a condition of receiving federal funds goes to the "first principles" of our federal system. *Lopez*, 521 U.S. at 552. Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," *id.* at 578 (Kennedy, J., joined by O'Connor, J., concurring), this Court must decide the issue. Accordingly, this Court should grant the Petition for a Writ of Certiorari.

III. THERE IS NO ALTERNATIVE BASIS FOR THE LOWER COURT'S JUDGMENT.

Although there is a conflict between the courts of appeal and although this issue goes to the very core of our federal system, the Respondents, nevertheless, may oppose this Petition on the grounds that the decision below is justified on alternative grounds. Specifically, the Respondents may assert that § 2000d-7 constitutes a valid abrogation of sovereign immunity for various federal statutes. If Congress properly has abrogated sovereign immunity, there is no reason to take up the issue of whether Congress could require waiver as a condition of receiving federal funds.

If the Respondents make such a contention, this Court must reject it. Quite simply, under this Court's decision in *Florida Prepaid*, § 2000d-7 is unconstitutional to the extent that it purports to abrogate sovereign immunity for various Spending Clause statutes. *See Bradley*, ___ F.3d at ___, 1999 WL 673228 at *8-10. To illustrate, in order for Congress to abrogate sovereign immunity, Congress must have acted pursuant to § 5 of the Fourteenth Amendment. *See College Savings Bank*, 119 S. Ct. at 2223. However, the mere fact that Congress has invoked § 5 of the Fourteenth Amendment does not mean that it has acted pursuant to § 5 of the Fourteenth Amendment. *See Florida Prepaid*, 119 S. Ct. at 2206. As this Court observed in *Florida Prepaid*, whether an act was passed pursuant to § 5 of the Fourteenth Amendment involves application of the two-part test mandated in *Flores*. Under that test, this Court first must determine whether Congress has explicitly identified conduct *by the States*, which transgresses

the substantive provisions of the Fourteenth Amendment. *See Florida Prepaid*, 119 S. Ct. at 2207. *See also Bradley*, ___ F.3d at ___, 1999 WL 673228 at *5 ("*Florida Prepaid* requires that Congress find that the states themselves are transgressing the constitution."). If there is no pattern of constitutional violations by the States, then Congress has not acted properly and the inquiry ends. *See College Savings Bank*, 119 S. Ct. at 2225-26. Alternatively, if there is a pattern of specific constitutional violations, then the Court must determine if the abrogation of sovereign immunity is a proportionate response to the violations. *Florida Prepaid*, 119 S. Ct. at 2210. If the response is not proportionate, then Congress has not acted properly.

When this analytical framework is applied to § 2000d-7's attempt to abrogate sovereign immunity for various federal claims, there is little doubt that "the statute cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's [Equal Protection] Clause." *Florida Prepaid*, 119 S. Ct. at 2202. First, Congress did not make findings of a specific pattern of violations of the Fourteenth Amendment by the States. Second, even if there were such findings, the response of abrogating sovereign immunity for all claims arising under various federal statutes is not proportionate to any purported constitutional violations. *See Florida Prepaid*, 119 S. Ct. at 2210. Accordingly, § 2000d-7 is unconstitutional to the extent that it purports to abrogate sovereign immunity for various federal claims.

Of course, some courts of appeal have held that 42 U.S.C. § 2000d-7(a)(1) is a constitutional abrogation of various federal claims. *See Lesage v. Texas*, 158 F.3d 213, 217 (5th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3469

(Jan. 11, 1999) (No. 98-1111); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *Doe v. University of Illinois*, 138 F.3d 653, 658-59 (7th Cir. 1998), *vacated and remanded on other grounds*, 119 S. Ct. 2016 (1999); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997), *cert. denied sub nom. Wilson v. Armstrong*, 118 S. Ct. 2340 (1998); *Crawford v. Davis*, 109 F.3d 1281, 1282-84 (8th Cir. 1997). However, those decisions were decided before *Florida Prepaid* and, as a result, failed to apply the two-part test mandated by *Flores*. Had *Florida Prepaid* been decided before *Lesage*, *Franks*, *Doe*, and *Crawford*, the respective courts of appeal would have reached the opposite result.[16]

In sum, because the attempt to abrogate sovereign immunity for various federal claims is unconstitutional under this Court's decision in *Florida Prepaid*, there is no alternative basis for the judgment of the lower court. Since there is no alternative basis for the judgment, the issue of whether Congress may require a State to waive its sovereign immunity as a condition of receiving federal

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[16] The experience of the Eighth Circuit illustrates this point. Just before the announcement of this Court's decision in *Florida Prepaid*, the Eighth Circuit upheld the abrogation of sovereign immunity for claims under the Individuals with Disabilities Education Act. *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 831-32 (8th Cir. 1999). Six weeks later, however, the Eighth Circuit declared that the "abrogation portion of *Mauney* has been undercut by subsequent events that have changed the legal landscape, and we believe that this portion of *Mauney* no longer represents current law." *Bradley*, ___ F.3d at ___, 1999 WL 673228 at *5.

funds is squarely before this Court. Accordingly, this Court should grant the Petition for a Writ of Certiorari.[17]

CONCLUSION

At the end of the day, our Constitution secures the blessings of liberty by dividing sovereignty between the States and the National Government. The decision below allows the National Government to use its superior financial resources to undermine that division of sovereignty. Such a decision demands review by this Court. Accordingly, this Court should **GRANT** the Petition for a Writ of Certiorari.

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[17] This Court may wish to exercise its discretion and direct the parties to brief and argue whether 42 U.S.C. § 2000d-7(a)(1) is a valid exercise of § 5 of the Fourteenth Amendment. *See Payne v. Tennessee*, 498 U.S. 1076 (1991) (Court requested parties to brief an issue not explicitly raised in the Petition). *See also* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* § 6.25(a) (7th ed. 1993).

Respectfully submitted this 4th day of October 1999.

GEORGE MASON UNIVERSITY

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APPENDIX

Annette Greco LITMAN, Plaintiff-Appellee,
United States of America, Intervenor-Appellee,

v.

GEORGE MASON UNIVERSITY,
Defendant-Appellant,

and

Eugene M. Norris; Geoffrey Orsak;
Girard Mulherin, Defendants.
American Civil Liberties Union of Virginia;
Trial Lawyers for Public Justice;
American Association of University Women;
American Association of University
Women Legal Advocacy Fund; American Civil
Liberties Union Women's Rights
Project; National Women's
Law Center, Amici Curiae.

No. 98-1742.

United States Court of Appeals,
Fourth Circuit.

Argued May 5, 1999.

Decided July 28, 1999.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (CA-97-1755-A)

ARGUED: William Eugene Thro, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellant. Alan Banov, Washington, D.C.; Seth Michael Galanter, United States Department of Justice, Washington, D.C., for Appellees. ON BRIEF: Mark L. Earley, Attorney General of Virginia, Ronald C. Forehand,

Senior Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellant. Bill Lann Lee, Acting Assistant Attorney General, Jessica Dunsay Silver, United States Department of Justice, Washington, D.C., for Appellee United States. Mary Bauer, American Civil Liberties Union of Virginia Foundation, Richmond, Virginia; Sarah Posner, Trial lawyers for Public Justice, P.C., Washington, D.C., for Amici Curiae.

Before NIEMEYER, MICHAEL, and TRAXLER, Circuit Judges.

OPINION

NIEMEYER, Circuit Judge:

Annette Litman, a student at George Mason University in Fairfax, Virginia, filed this action against the University and some of its employees, alleging sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. To justify her suit against a state instrumentality in federal court, Litman relied on 42 U.S.C. § 2000d-7(a)(1), which provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972."

George Mason University claims with respect to § 2000d-7(a)(1) that (1) Congress lacked the requisite constitutional authority to abrogate its Eleventh Amendment immunity and (2) the provision does not unequivocally effect a voluntary waiver of its Eleventh Amendment immunity. While the district court agreed

with the University that Title IX exceeded Congress' remedial authority under § 5 of the Fourteenth Amendment to abrogate its Eleventh Amendment immunity, the district court upheld 42 U.S.C. § 2000d-7(a)(1) under the Spending Clause of Article I of the Constitution as a lawful condition of the University's voluntary acceptance of federal education funding under Title IX. For the reasons that follow, we affirm.

I

George Mason University ("GMU") is a state-created university "subject at all times to the control of the [Virginia] General Assembly." Va. Code Ann. § 23-91.24. Moreover, the parties agree that GMU is a recipient of federal education funding within the meaning of Title IX, 20 U.S.C. § 1681(a). *See* 20 U.S.C. § 1687.

In her complaint, which supplies us with the facts in this case at the motion to dismiss stage, Annette Litman alleges that in 1995, as a student in GMU's "extended studies" program, she enrolled in a computer science course with Professor Eugene Norris, for whom she also worked as a research assistant. Over the course of the fall semester, Norris became infatuated with Litman, telling her routinely that he loved her and asking questions about her marriage and specifically about her sex life. Norris also stalked Litman, waiting for her after her speech class, on one occasion, to tell her that he "missed her" and that, despite her efforts to avoid him, he "had his ways" of locating her. After Litman terminated her research position with Norris, she received an e-mail

from him stating, "Don't marry someone you can live with, Marry someone you can't live without."

In February 1996, Litman filed a sexual harassment complaint against Norris with GMU's Equity Office, requesting that Norris be reprimanded for his conduct and ordered to stay away from her. The Equity Office ordered Norris to avoid contact with Litman, but it refused to investigate the complaint further, characterizing Litman's allegations of sexual harassment as a "fishing expedition" grounded in conjecture. Finding this response inadequate, Litman sought the intervention of GMU's president. She also circulated a petition urging GMU to investigate Norris' alleged wrongdoings, but GMU failed to undertake the requested investigation.

Unable to locate a professor to supervise her senior research project, Litman maintained that GMU's faculty refused to interact with her once it became known that she had filed a sexual harassment complaint against one of its members. She thereafter sent suggestive and hostile e-mail messages to certain faculty members, resulting in two professors instituting sexual harassment charges of their own against her pursuant to GMU's Student Judicial Code. Following a trial before GMU's University Judicial Board in May 1996, the Board found Litman guilty of these charges and both imposed academic sanctions against her and expelled her from GMU. Litman asserts that the Board's process was so irregular that GMU effectively precluded her from preparing an adequate defense. Litman's complaint against Norris was tried in October 1996 and resulted in a finding that Norris had not violated GMU's sexual harassment policy.

In October 1997, Litman filed this action alleging that GMU and some of its employees discriminated and retaliated against her on the basis of her sex in violation of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.* Invoking Eleventh Amendment immunity, GMU moved to dismiss the complaint for lack of jurisdiction. Litman responded, maintaining that Congress, through its enactment of the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7(a)(1), abrogated GMU's Eleventh Amendment immunity, or, alternatively, that GMU waived its immunity as a condition to receiving federal funding under Title IX. When GMU contended that Congress' effort to abrogate GMU's Eleventh Amendment immunity was unconstitutional, the United States intervened, pursuant to 28 U.S.C. § 2403(a), to defend the constitutionality of 42 U.S.C. § 2000d-7(a)(1).

The district court denied GMU's motion to dismiss. Relying on *City of Boerne v. Flores*, 521 U.S. 507 (1997), the court determined that the protections afforded by Title IX differed from those afforded by the Equal Protection Clause of the Fourteenth Amendment in important ways. It concluded first that Title IX regulated both private and state-sponsored conduct, whereas the Equal Protection Clause, by its terms, regulated only state action. Second, it concluded that Title IX reached beyond the Fourteenth Amendment's prohibitions against gender discrimination by imposing liability on funding recipients for "non-intentional (i.e. disparate impact) discrimination." *Litman v. George Mason Univ.*, 5 F.Supp.2d 366, 374 (E.D.Va.1998). The district court accordingly concluded that § 5 of the Fourteenth Amendment did not provide Congress with the authority to abrogate GMU's Eleventh Amendment

immunity. The court went on to hold, however, that GMU waived its Eleventh Amendment immunity by accepting Title IX funding, which was conditioned on the unambiguous waiver of immunity codified in 42 U.S.C. § 2000d-7(a)(1). The court reasoned that while Congress does not have "the authority pursuant to its Article I powers to simply *abrogate* the States' Eleventh Amendment immunity, Congress does have the power to require the States to *waive* their immunity pursuant to a valid exercise of its spending power." *Id.* at 375. Relying on language in *South Dakota v. Dole*, 483 U.S. 203 (1987), and *New York v. United States*, 505 U.S. 144 (1992), the district court also emphasized that the Eleventh Amendment presented no "independent constitutional bar" to Congress' employing its spending power in this manner. *Id.* at 376 (internal quotation marks omitted).

From the district court's denial of GMU's motion asserting Eleventh Amendment immunity, GMU noticed this interlocutory appeal. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (holding that "States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity").

II

On appeal, GMU contends that notwithstanding the provisions of the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7(a)(1), which amended Title IX to make explicit that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the

United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972," it may not be sued in federal court. It argues that in enacting § 2000d-7(a)(1), Congress lacked the power to abrogate Eleventh Amendment immunity through § 5 of the Fourteenth Amendment and also that GMU did not consent to a waiver because "there is nothing in Title IX or in Congress' attempt to abrogate the Eleventh Amendment which states that waiver of the Eleventh Amendment is a condition of receiving federal funds."

Before determining whether Congress' effort to abrogate GMU's Eleventh Amendment immunity is justified by § 5 of the Fourteenth Amendment, we first consider whether GMU consented to waive its Eleventh Amendment immunity as a condition of receiving federal education funds.

The Eleventh Amendment provides in pertinent part that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." It is well established that this amendment, despite its express terms, also precludes citizens from bringing suits in federal court against their own states. *See Hans v. Louisiana*, 134 U.S. 1 (1890); *see also Alden v. Maine*, No. 98-436, 1999 WL 412617, at *15 (U.S. June 23, 1999) (emphasizing that the Eleventh Amendment confirms rather than establishes a state's *sovereign* immunity as a constitutional principle and that its sovereign immunity is not limited by the text of the Eleventh Amendment).

By limiting the federal judicial power over the states, the Eleventh Amendment preserves a federal balance and confirms the constitutional design in which each state remains a sovereign entity generally immune from suit. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58, 72 (1996); *see also Alden*, 1999 WL 412617, at *28 (stating that "[t]he principle of sovereign immunity preserved by constitutional design thus accords the States the respect owed them as members of the federation" (internal quotation marks and citation omitted)). Inherent in this federal structure is the mutual, reciprocating respect for the state and federal sovereigns, and forcing one sovereign to appear against its will in the courts of another violates this respect. *See Seminole Tribe*, 517 U.S. at 54; *see also Alden*, 1999 WL 412617, at *7 (stating that because the "States retain a 'residuary and inviolable sovereignty,' [t]hey are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority of sovereignty" (quoting *The Federalist* No. 39)). Accordingly,

> [t]he Eleventh Amendment does not exist solely in order to prevent federal-court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.

Seminole Tribe, 517 U.S. at 58 (internal quotation marks, brackets, and citations omitted).

The immunity guaranteed by the Eleventh Amendment, however, has well-established exceptions also

inherent in the federal structure. First, Congress can abrogate the immunity without state consent if it acts pursuant to a valid exercise of constitutional power sufficient to abrogate the immunity and it unequivocally expresses its intent to do so. *See Seminole Tribe*, 517 U.S. at 55. Because the Fourteenth Amendment was adopted well after both the Eleventh Amendment and the ratification of the Constitution, and was designed to "expand[ ] federal power at the expense of state autonomy," the power granted to Congress by § 5 of the Fourteenth Amendment is recognized to "intrude upon the province of the Eleventh Amendment." *Id.* at 59. Accordingly, Congress may act under the authority of § 5 of the Fourteenth Amendment to abrogate a state's Eleventh Amendment immunity. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, No. 98-149, 1999 WL 412639, at *3 (U.S. June 23, 1999) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

In addition, the Eleventh Amendment does not preclude the federal government from bringing suit against states in federal court to ensure compliance with federal law. *See Seminole Tribe*, 517 U.S. at 71 n. 14; *United States v. Texas*, 143 U.S. 621, 644-45 (1892). Nor does the Eleventh Amendment preclude a private citizen from suing a state officer in federal court "to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n. 14 (citing *Ex Parte Young*, 209 U.S. 123 (1908)).

Finally, a state may waive its Eleventh Amendment immunity by consenting to be sued in federal court. *See College Savings Bank*, 1999 WL 412639, at *3; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997); *Seminole*

Tribe, 517 U.S. at 63 (acknowledging the "unremarkable . . . proposition that the States may waive their sovereign immunity" (citations omitted)); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). Permitting such waivers reflects the fact that sovereign immunity is an element of state sovereignty, not a categorical limitation on the federal judicial power. *See Coeur d'Alene Tribe of Idaho*, 521 U.S. at 267 (stating that, because "a State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it," the Eleventh Amendment "enacts a sovereign immunity from suit, *rather than a nonwaivable limit* on the Federal Judiciary's subject-matter jurisdiction" (emphasis added)); *see also* Erwin Chemerinsky, *Federal Jurisdiction* 406 (2d ed.1994) (linking the Eleventh Amendment with principles of sovereign immunity and observing that "[t]raditionally, sovereign immunity could be waived and that principle has carried over to Eleventh Amendment jurisprudence").

A state may waive its immunity in two ways. *See Booth v. Maryland*, 112 F.3d 139, 145 (4th Cir.1997). It may "directly and affirmatively waive its Eleventh Amendment immunity in a state statute or constitutional provision, as long as the provision explicitly 'specif[ies] the state's intention to subject itself to suit in federal court.' " *Id.* (quoting *Atascadero State Hosp.*, 473 U.S. at 241 (brackets in original)). Alternatively, it may "waive its immunity by voluntarily participating in federal spending programs when Congress expresses 'a clear intent to condition participation in the programs . . . on a State's

consent to waive its constitutional immunity.' " *Id.* (quoting *Atascadero State Hosp.*, 473 U.S. at 247 (ellipses in original)).

But because of the Eleventh Amendment's vital role in preserving the federal balance, determinations of whether a State has waived its immunity are subjected to "stringent," exacting standards. *College Savings Bank*, 1999 WL 412639, at *7 (quoting *Atascadero State Hosp.*, 473 U.S. at 241). Thus, a court may not find a waiver absent an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero State Hosp.*, 473 U.S. at 238 n. 1; *see also Pennhurst State School v. Halderman ("Pennhurst I")*, 451 U.S. 1, 17 (1981) (citations omitted); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). "The whole point of requiring a 'clear declaration' by the State of its waiver is to be certain that the State in fact consents to suit." *College Savings Bank*, 1999 WL 412639, at *9. Accordingly, a State cannot be deemed to have waived its Eleventh Amendment immunity constructively even by engaging in activities after Congress has "made clear that such activity would subject [the State] to suit [in federal court]." *Id.* at *4, *9 (overruling *Parden v. Terminal R. Co. of Ala. Docks Dep't*, 377 U.S. 184 (1964)). Similarly, the "mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Atascadero State Hosp.*, 473 U.S. at 246-47 (citations omitted).

Litman contends in this case that GMU, by accepting federal education funds under Title IX, has, as a condition of receiving those funds, unambiguously waived its Eleventh Amendment immunity. The district court agreed. GMU, on the other hand, contends that while 42 U.S.C.

§ 2000d-7(a)(1) indicates, albeit unconstitutionally, that it is subject to suit in federal court, "there is *nothing* in the text that even remotely suggests that Virginia's public universities must waive the Eleventh Amendment as a condition of receiving federal funds. Indeed, the statute does not even contain the word 'waiver.' " It argues that a statute "must say something like 'as a condition of receiving federal funds under this Act, the States agree to waive their Eleventh Amendment immunity' " and that absent such explicit language, the mere receipt of Title IX funds cannot effect a waiver.

To resolve this dispute, we turn to the applicable statutory provisions to determine whether they provide unambiguously that GMU, by agreeing to receive federal education funds under Title IX, has waived its Eleventh Amendment immunity.

III

The statutory framework applicable to this case is straightforward. Title IX provides that in connection with any education program or activity receiving federal financial assistance, stipulated here to include GMU's program, "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination." 20 U.S.C. § 1681(a). The Supreme Court has held that this provision gives a student an implied right of action for sexual harassment by a teacher in such a program, provided the program's officials have "actual notice of, and [have been] deliberately indifferent to, the teacher's misconduct." *Gebser v. Lago Vista Indep. School Dist.*, 118 S.Ct. 1989, 1993 (1998).

Finally, 42 U.S.C. § 2000d-7(a)(1) provides that for a violation of the antidiscrimination edict in § 1681(a), a state "shall not be immune under the Eleventh Amendment . . . from suit in Federal court."

Section 1681(a), which precludes the use of Title IX federal education funds for discriminatory purposes, was enacted under the Spending Clause of the Constitution, U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes . . . to . . . provide for the . . . general Welfare of the United States"). As a federal spending program, it operates "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst I*, 451 U.S. at 17; *see also Davis v. Monroe County Bd. of Educ.*, 119 S.Ct. 1661, 1669 (1999) (characterizing Title IX as Spending Clause legislation); *Gebser*, 118 S.Ct. at 1997 (same). In other words, in exercising its spending power, the federal government "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser*, 118 S.Ct. at 1997 (citations omitted); *see also Davis*, 119 S.Ct. at 1670. And it also conditions these funds on the recipient state's consent to be sued in federal court for an alleged breach of the promise not to discriminate. *See* 42 U.S.C. § 2000d-7(a)(1).

Because of the mutuality required in a contractual relationship of this type – the federal grant in exchange for state agreement to attached conditions – the legitimacy of the attached conditions rests "on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Pennhurst I*, 451 U.S. at 17 (citations omitted).

Thus, Spending Clause legislation, in contrast to other Article I legislation or § 5 legislation, presents a state with a choice: the state can either comply with certain congressionally mandated conditions in exchange for federal funds or not comply and decline the funds. Similarly, "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *College Savings Bank*, 1999 WL 412639, at *12. As the Supreme Court has observed, the attachment of conditions to grants made under the Spending Clause is a "permissible method of encouraging a State to conform to federal policy choices." *New York v. United States*, 505 U.S. 144, 168 (1992). The Court explained,

> If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

Id. As a general proposition, therefore, when Congress acts pursuant to its spending power, there is no categorical prohibition against its attaching conditions to grants made to the states. *See College Savings Bank*, 1999 WL 412639, at *12; *New York*, 505 U.S. at 167; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

This mechanism for exercising power under the Spending Clause, however, must have limits. Otherwise, Congress "could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167. Indeed, an unlimited Spending Clause power could circumvent the entire constitutional structure. As Justice O'Connor observed,

> [i]f the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."

South Dakota, 483 U.S. at 217 (O'Connor, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

The Supreme Court has recognized at least five such limitations. *First*, the exercise of the spending power must be for the general welfare. *See* U.S. Const. art. I, § 8, cl. 1; *South Dakota*, 483 U.S. at 207. *Second*, if the grant or expenditure is, when made to the states, accompanied by conditions, the conditions must be stated "unambiguously." *South Dakota*, 483 U.S. at 207. *Third*, any conditions imposed must "bear some relationship to the purpose of the federal spending" so that a reasonable nexus exists between the two. *New York*, 505 U.S. at 167; *South Dakota*, 483 U.S. at 207-08; *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion). *Fourth*, the grant or expenditure and the conditions attached to it

may not violate any independent constitutional prohibition. *See South Dakota*, 483 U.S. at 208. And *fifth*, the financial inducement offered by Congress must not be "so coercive as to pass the point at which pressure turns into compulsion." *Id.* at 211 (internal quotation marks and citations omitted); *see also Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir.1997) (en banc) (plurality opinion of Luttig, J.) (finding coercive Congress' withholding of "the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States").

In the context of Title IX as applicable to the case before us, Congress has attached at least two conditions to GMU's receipt of Title IX funding: (1) GMU cannot discriminate on the basis of sex, *see* 20 U.S.C. § 1681(a), and (2) when responding to alleged acts of discrimination, GMU waives its Eleventh Amendment immunity, *see* 42 U.S.C. § 2000d-7(a)(1). This appeal requires us to determine whether these conditions, considered together, fall within the limitations imposed on Congress' Spending Clause power under current Supreme Court jurisprudence.

GMU does not contend that Title IX funds are not spent for the general welfare; that the prohibition of discrimination and the accompanying waiver of Eleventh Amendment immunity are not reasonably related to grants of education funds; or that the attachment of conditions to the funding arrangement is coercive. Rather, it maintains that it did not knowingly waive its Eleventh Amendment immunity because that condition of waiver

was not made unambiguously clear in the text of § 2000d-7(a)(1). That provision, GMU observes, uses neither the term "condition" nor the term "waiver." GMU also contends that Congress may not impose a waiver of Eleventh Amendment immunity as a condition of funding: "it is constitutionally impossible for Congress to require the States to waive the Eleventh Amendment as a condition of receiving federal funds." We address these two points in order.

A

GMU acknowledges that it voluntarily accepts Title IX funding. Indeed, it must apply for federal funds. And in connection with any application, it must assure the Federal Government of its intent to comply with 20 U.S.C. § 1681(a). Implementing regulations provide that each recipient of Title IX funding must enter into a contract of assurance with the Department of Education and thereby manifest its intent to adhere to the conditions imposed by Title IX. *See* 34 C.F.R. § 106.4(a) (providing, in pertinent part, that "[e]very application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part"). Thus, in voluntarily accepting federal education funds, GMU is unequivocally put on notice of three conditions: (1) that it may not discriminate in its programs on the basis of sex, *see* 20 U.S.C. § 1681(a); (2) that if it does discriminate on the basis of sex, it may be

sued by a private individual, *see Gebser*, 118 S.Ct. at 1996, 1999; and (3) that in any such suit, it may not assert its Eleventh Amendment immunity, *see* 42 U.S.C. § 2000d-7(a)(1). There can be no doubt that GMU is able "to ascertain what is expected of it" in return for federal education funds. *Pennhurst I*, 451 U.S. at 17.

The Supreme Court appears to have acquiesced in this same construction, characterizing the waiver language of § 2000d-7(a)(1) as unequivocal. In the context of evaluating whether, under § 2000d-7(a)(1), federal agencies, like private entities, would be subject to monetary damages for Rehabilitation Act violations, the Court observed:

> By enacting [42 U.S.C. § 2000d-7(a)(1)], Congress sought to provide the sort of *unequivocal waiver that our precedents demanded.*
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> * * *
>
> Given the care with which Congress responded to our decision in *Atascadero* by crafting an *unambiguous waiver of the States' Eleventh Amendment immunity* in [42 U.S.C. § 2000d-7(a)(1)], it would be ironic indeed to conclude that the same provision "unequivocally" establishes a waiver of the Federal Government's sovereign immunity against monetary damages awards . . . in the remedies provision attached to the *unambiguous waiver of the States' sovereign immunity*.

Lane v. Pena, 518 U.S. 187, 198, 200 (1996) (emphasis added).

Thus, we conclude that Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal

condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1). In enacting that section, Congress responded with "care" to "[the Supreme Court's] decision in *Atascadero* by crafting an unambiguous waiver of the state's Eleventh Amendment immunity." *Id.* at 200; *accord Clark v. California*, 123 F.3d 1267, 1271 (9th Cir.1997) (relying on 42 U.S.C. § 2000d-7(a) in the context of holding that California, by accepting federal funds under the Rehabilitation Act, waived its Eleventh Amendment immunity), *cert. denied sub nom. Wilson v. Armstrong*, 118 S.Ct. 2340 (1998). Moreover, any state reading § 2000d-7(a)(1) in conjunction with 20 U.S.C. § 1681(a) would clearly understand the following consequences of accepting Title IX funding: (1) the state must comply with Title IX's antidiscrimination provisions, and (2) it consents to resolve disputes regarding alleged violations of those provisions in federal court.

In reaching this conclusion, we reject GMU's assertion that a statute "must say something like 'as a condition of receiving federal funds under this Act, the States agree to waive their Eleventh Amendment immunity.' " The only difference between GMU's proffered language and that employed in § 2000d-7(a)(1) is that the former is cast in the affirmative (i.e., "the States agree to waive") and the latter in the negative (i.e., "a State shall not be immune"). But this difference in phrasing is of no constitutional import. Using negative rather than affirmative language does not alter the plain meaning of § 2000d-7(a)(1) – that is, by accepting Title IX funding, a state agrees to waive its Eleventh Amendment immunity.

B

GMU's second argument, that Congress cannot employ its spending power in a manner that conditions a state's receipt of funding upon a waiver of Eleventh Amendment immunity, is also without merit under current Supreme Court jurisprudence. While the Supreme Court in *South Dakota* noted that the spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional," 483 U.S. at 210, such as conditioning a grant of federal funds "on invidiously discriminatory state action or the infliction of cruel and unusual punishment," *id.*, it stated that the range of permissible conditions extended beyond the original enumerations of congressional power granted by the Constitution, *see id.* Thus, while abrogating Eleventh Amendment immunity would be impossible unless exercised under the Fourteenth Amendment, *see Seminole Tribe*, 517 U.S. at 59, conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity. *See Alden*, 1999 WL 412617, at *32 ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits" (citing *South Dakota*)); *see also College Savings Bank*, 1999 WL 412639, at *12 & n. 2 (suggesting that Congress, in legislating under the Spending Clause, can condition a waiver of sovereign immunity upon the states' acceptance of a federal grant). Thus, when a condition under the Spending Clause includes an unambiguous waiver of Eleventh Amendment immunity, the condition is constitutionally permissible as long as it rests on the state's voluntary and

knowing acceptance of it. *See Atascadero State Hosp.*, 473 U.S. at 238-40; *Pennhurst I*, 451 U.S. at 17.

Accordingly, we conclude that Congress, in enacting 42 U.S.C. § 2000d-7(a)(1), permissibly conditioned GMU's receipt of Title IX funds on an unambiguous waiver of GMU's Eleventh Amendment immunity, and that, in accepting such funding, GMU has consented to litigate Litman's suit in federal court.

IV

The important role that the Eleventh Amendment plays in our federal structure demands that we pause to consider the larger implications of concluding that a state waives its immunity from suit in federal court by accepting Title IX funding. This inquiry is especially important given the recent intensity with which the Supreme Court and this circuit have focused on issues of federalism, separation of powers, and a limited federal government. *See, e.g., Alden v. Maine*, No. 98-436, 1999 WL 412617 (U.S. June 23, 1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, No. 98-149, 1999 WL 412639 (U.S. June 23, 1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, No. 98-531, 1999 WL 412723 (U.S. June 23, 1999); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991); *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir.1999) (en banc); *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir.1999);

Condon v. Reno, 155 F.3d 453 (4th Cir.1998), *cert. granted*, 119 S.Ct. 1753 (1999); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1145 (4th Cir.1997), *cert. denied sub nom. Schlossburg v. Maryland Comptroller of Treasury*, 118 S.Ct. 1517 (1998).

These decisions collectively counsel that we not lightly conclude that principles of federalism and state sovereign immunity permit Congress to employ its spending power in a manner that ultimately effects a waiver of a state's Eleventh Amendment immunity. *See generally Lopez*, 514 U.S. at 578 (Kennedy, J., concurring) ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far"). Specifically, any conclusion we reach today must respect the Supreme Court's admonition in *Seminole Tribe* that the "Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent limitations placed upon federal jurisdiction." 517 U.S. at 72-73. Further, we must acknowledge that "[r]ecognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*." *College Savings Bank*, 1999 WL 412639, at *11.

We do not intend to question these propositions. However, we do not read *Seminole Tribe* and its progeny, including the Supreme Court's recent Eleventh Amendment decisions, to preclude Congress from conditioning federal grants on a state's consent to be sued in federal

court to enforce the substantive conditions of the federal spending program. Indeed, to do so would affront the Court's acknowledgment in *Seminole Tribe* of "the unremarkable . . . proposition that States may waive their sovereign immunity." 517 U.S. at 65. Furthermore, in *New York* the Court emphasized that principles of federalism do not pose an independent constitutional bar to Congress' powers under the Spending Clause:

> By [employing the spending power to attach conditions on the States' receipt of federal funding], as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.

New York, 505 U.S. at 168. If the Supreme Court were one day to adopt a Madisonian construction of the Spending Clause,* perhaps Congress would be inhibited from

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* As an original matter, Alexander Hamilton and James Madison appear to have taken different positions regarding the scope and purposes of the Spending Clause. Hamilton contended that "[t]he terms *'general Welfare'* [as used in the Spending Clause] were doubtless intended to signify more than was expressed or imported in those which Preceded; otherwise numerous exigencies incident to the affairs of a Nation would have been left without a provision." Alexander Hamilton, Report on Manufacturers (Dec. 5, 1791), *reprinted in 2 The Founders' Constitution* 446, 446 (Philip B. Kurland & Ralph Lerner eds., 1987). He reasoned:

> The phrase is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union to appropriate

implementing a spending program that both intruded upon a state's general police powers and conditioned the

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> its revenues shou'd have been restricted within narrower limits than the "General Welfare" and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.

Id. at 446-47.

Madison, on the other hand, believed that the history underlying the insertion of the "general Welfare" language into the Spending Clause proved Hamilton's construction to be error. He contended that the Framers never "understood [that phrase to] invest Congress with powers not otherwise bestowed by the constitutional charter." Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), *reprinted in 2 The Founders' Constitution, supra,* 453, 456. Madison grounded his construction of the Spending Clause in principles underlying our *federal* order:

> [F]or it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant and cautious definition of Federal powers should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions and definitions elaborated by them.
>
> Consider for a moment the immeasurable difference between the Constitution limited in its powers to the enumerated objects, and expounded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two Constitutions, of characters essentially contrasted with each other – the one possessing powers confined to certain specified cases, the other extended to all cases whatsoever; for what is the case that would not be embraced by a general power to raise money, a power to provide for the general welfare, and a power to pass all laws necessary and proper to carry these powers into execution; all such provisions and laws superseding,

outlay of funding on a state's waiving its sovereign immunity. In deciding this case, however, we are bound

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> at the same time, all local laws and constitutions at variance with them? Can less be said, with the evidence before us furnished by the journal of the Convention itself, then that it is impossible that such a Constitution as the latter would have been recommended to the States by all the members of that body whose names were subscribed to the instrument?
>
> * * *
>
> The Constitution is a limited one, possessing no power not actually given, and carrying on the face of it a distrust of power beyond the distrust indicated by the ordinary forms of free Government.

Id. at 455, 457.

In *United States v. Butler*, 297 U.S. 1 (1936), albeit in dictum, the Supreme Court appears to have acquiesced in the Hamiltonian position:

> While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

Id. at 66. The Court confirmed its adoption of the Hamiltonian view one year later in *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-87 (1937) (Cardozo, J.) (upholding New Deal legislation and observing that "[i]t is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare" (citing *Butler*, 297 U.S. at 65-66)).

by the Court's existing constructions of the scope of Congress' spending power.

Because we hold that GMU, through its acceptance of Title IX funding, waived its Eleventh Amendment immunity, we need not reach the question of whether Congress can constitutionally abrogate that immunity through § 5 of the Fourteenth Amendment. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX

Annette Greco LITMAN, Plaintiff,
v.
GEORGE MASON UNIVERSITY et al., Defendants.

No. Civ.A. 97-1755-A.

United States District Court,
E.D. Virginia,
Alexandria Division.

May 7, 1998.

Annette Kay Rubin, Leesburg, VA, for Annette Greco Litman.

Ronald C. Forehand, Asst. Atty. Gen., Richmond, VA, for George Mason University, Geoffrey Orsak, Girard Mulherin.

James V. Ingold, Fairfax, VA, for Eugene M. Norris.

MEMORANDUM OPINION

CACHERIS, District Judge.

This matter comes before the Court on Defendant George Mason University's ("GMU") Motion to Dismiss Counts I and II; Defendant Dean Girard Mulherin's ("Mulherin") Motion for Summary Judgment; Plaintiff's Motion to Exclude Treating Healthcare Providers from the Requirement of Preparing a Written Report Pursuant to Fed.R.Civ.Pro. 26(a)(2)(B); and Plaintiff's Motion to Reconsider the Court's ruling dismissing her Equal Protection claim as to Defendants Orsak and Mulherin.

I.

Plaintiff Annette Greco Litman ("Litman") began attending GMU in the Summer of 1995 as a student in the extended studies program. In the Fall of 1995, she signed up for a computer science class, taught by Professor Norris. Litman also accepted a position as Norris' research assistant. Litman alleges that Norris misrepresented the course requirements to her and that it therefore became necessary for her to seek extra help from Norris. During the period while she was Norris' student and research assistant, Litman alleges that Norris engaged in a course of behavior towards her that began with his paying extra attention to her and sitting close to her, and escalated to the point that, when they would have lunch together, Norris initiated conversations about Litman's marriage, and, specifically, about her sex life with her husband. Litman alleges that Norris was particularly interested in talking about, for example, the fact that Litman and her husband slept in separate beds. Litman claims that this culminated, in November of 1995, in Norris' telling her that he was falling in love with her.

At this point, Litman alleges that she sought the advice of Professor Orsak, an Associate Professor of Electrical and Computer Engineering at GMU. Litman claims that his only response was to suggest that she report any possible sexual assault to the campus police. In January, 1996, Litman states that she terminated her research position with Professor Norris. After this, Norris allegedly sent Litman an e-mail which read: "Don't marry someone you can live with/ Marry someone you can't live without." At this point, Litman began to suffer mentally and physically from the stress of this situation. Again, she

sought counsel from Orsak, who, this time, referred her to the Student Development Office.

Norris apparently continued to bother Litman, even looking up her schedule using faculty codes and showing up outside classrooms where he knew that she would be present. As this continued, Litman filed a complaint with the Equity Office.

Litman had trouble finding a Professor to advise her work on her Senior Project after she stopped working for Norris. She claims that she was too emotionally distressed to be in personal contact with any professors. At one point, she was contacted by one of her professors, Dr. Paris, for permission to use her homework as an example for the rest of the class. Litman responded by giving her permission but also sending him an e-mail which she states was "suggestive, sarcastic and angry." She later apologized.

For reasons not fully explained in Plaintiff's Complaint, Professors Paris and Orsak filed a complaint against Litman in the Equity Office that spring, reporting that Litman had been sexually harassing them. Litman was upset, and she proceeded to e-mail faculty members about her concerns regarding her treatment by Paris, Orsak, and Norris. Litman also contacted the Equity Office again, and she also circulated a petition regarding her complaints against Norris.

Litman's hearing was scheduled for May 30. She sought to postpone the disciplinary proceedings, claiming that she needed more time due to her emotional distress and the sedatives she was taking for stress. Her request was denied, and the disciplinary proceedings

took place as scheduled on May 30. Dean Mulherin, GMU's Judicial Administrator, was in charge of the proceedings. Litman claims that there were several procedural irregularities, for example, she was not allowed to question Orsak about specific pieces of correspondence which he claimed were harassing. Litman was found guilty. She was permanently expelled from GMU, academic sanctions were imposed regarding her incomplete grades, and she was forbidden to enter any GMU campus or to speak with any of the faculty involved, with the exception of Dean Mulherin.

Litman's sexual harassment claims against Norris were tried on October 17, 1996. The disciplinary panel found that Norris had not violated GMU sexual harassment policy but had failed to live up to GMU "standards" related to that policy. No sanctions were imposed against Norris.

On October 31, 1997, Litman filed her Complaint against GMU, Norris, Orsak, and Mulherin, under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.; 42 U.S.C. § 1983; and state law. She claimed Gender Discrimination in Violation of Title IX (Against GMU) (Count I); Retaliation in Violation of Title IX (Against GMU) (Count II); Deprivation of Free Speech Rights Under Color of Law (Against Orsak, Mulherin and GMU) (Count III); Deprivation of Due Process Under Color of Law (Against GMU, Orsak and Mulherin) (Count IV); Deprivation of Equal Protection Rights Under Color of Law (Against Norris, Orsak, Mulherin, and GMU) (Count V); and Intentional Infliction of Emotional Distress (Against Norris) (Count VI).

By Order dated January 22, 1998, this Court granted Defendant's Motion to Dismiss Count III; granted Defendants' Motion to Dismiss Count IV in part ("Count IV is Dismissed as against Defendants George Mason University and Orsak, but Count IV remains as against Defendant Mulherin"); granted Defendants' GMU, Orsak, and Mulherin's Motion to Dismiss Count V; and denied Defendant Norris' Motion to Dismiss Counts V and VI. The Court deferred ruling on Defendant GMU's Motion to Dismiss Counts I and II, in order to permit the United States an opportunity to intervene in accordance with 28 U.S.C. § 2403(a). On February 18, the Court granted the United States' motion for intervention of right in order to give the United States the opportunity to be heard on the issue of the constitutionality of the abrogation of states' Eleventh Amendment immunity under Title IX. The Court accepted additional briefs from all parties and heard argument from all parties on the abrogation issue on March 12, 1998.

II.

In support of its motion to dismiss Counts I and II, GMU argues that the Eleventh Amendment deprives this Court of jurisdiction over these claims. Specifically, GMU argues that 42 U.S.C. § 2000d-7 is unconstitutional to the extent that it purports to abrogate the States' Eleventh Amendment immunity for Title IX questions.

A.

"The burden of proving subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss is on the plaintiff, the

party asserting jurisdiction." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982). "[T]he complaint will be construed broadly and liberally, in conformity with the principle set forth in Rule 8(f), but argumentative inferences favorable to the pleader will not be drawn." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (1990).

> [S]ubject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power. Accordingly, upon a challenge to the court's jurisdiction by a party, the court should conduct a careful inquiry and make a conclusive determination whether it has subject matter jurisdiction or not, or at least defer the inquiry if it is intertwined with the merits of the case.

Id. (1997 Pocket Part).

B.

In *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the Supreme Court held that, notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore the Indian Gaming Regulatory Act cannot grant jurisdiction over a state that does not consent to be sued. More broadly, in overruling its plurality decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) the Supreme Court limited Congress'

authority to abrogate States' Eleventh Amendment immunity to those provisions enacted pursuant to its power under 5 of the Fourteenth Amendment. *Id.* at 1127.

In overruling *Union Gas*, the Supreme Court held that, if Congress attempts to abrogate the States' sovereign immunity pursuant to some other source of Congressional power, such as Congress' Article I powers, then the abrogation is invalid:

> It was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts, jurisdiction under Article III. . . . As the dissent in *Union Gas* recognized, the plurality's conclusion – that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III – 'contradict[ed] our unvarying approach to Article III as setting forth the exclusive catalog of permissible federal court jurisdiction.' Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the federal courts beyond the bounds of Article III.

Id. at 1127-28 (citation omitted) (emphasis in original).

In order to determine whether Congress' attempt to abrogate States' sovereign immunity for Title IX actions is valid, this Court must follow the two-part test set forth in *Seminole Tribe*. First, the court must ask whether Congress has "unequivocally expresse[d] its intent to abrogate

immunity." *Id.* at 1123. If so, the court must then ask whether Congress has acted "pursuant to a valid exercise of power," that is, pursuant to § 5 of the Fourteenth Amendment. *Id.*

GMU concedes that Congress, by enacting 42 U.S.C. § 2000d-7, has expressed its intention to abrogate the State's Eleventh Amendment immunity for Title IX actions.[1] The issue for the Court is, thus, whether Congress, in purporting to abrogate the Eleventh Amendment for Title IX claims, acted pursuant to § 5 of the Fourteenth Amendment.

"Congress' failure to mention that it acted pursuant to Section Five of the Fourteenth Amendment is not dispositive." *CSX Transportation, Inc. v. Board of Public Works of the State of West Virginia,* 138 F.3d 537 (4th Cir.1998).

> It is in the nature of our review of congressional legislation defended on the basis of Congress's powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite

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[1] "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal fund assistance." 42 U.S.C.A. § 2000d-7 (1994).

> the words "section 5" or "Fourteenth Amendment" or "equal protection" for "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

EEOC v. Wyoming, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 1064, n. 18, 75 L.Ed.2d 18 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 476-478, 100 S.Ct. 2758, 2773-74, 65 L.Ed.2d 902 (1980); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S.Ct. 421, 424, 92 L.Ed. 596 (1948)). The "appropriate test for determining when Congress intends to enforce the guarantees of the Fourteenth Amendment" when Congress' intent is ambiguous, however, favors a finding that Congress did not intend to act pursuant to its section 5 powers. "Because such legislation imposes constitutional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Gregory v. Ashcroft*, 501 U.S. 452, 469, 111 S.Ct. 2395, 2405-06, 115 L.Ed.2d 410 (1991) (citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981)).

The Eighth Circuit has relied upon language in *EEOC v. Wyoming* and has fashioned a somewhat different inquiry:

> Because Congress need not expressly invoke the authority of a specific constitutional provision to act pursuant to it, we believe that the latter condition requires us to make an objective inquiry, namely, whether Congress could have enacted the legislation at issue pursuant to a constitutional provision granting it the power to

> abrogate. As long as Congress had such authority as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant.

Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir.1997). *See also Franks v. Kentucky School for the Deaf*, 142 F.3d 360, 1998 WL 193177 (6th Cir.1998); *CSX Transportation*, 138 F.3d 537, 1998 WL 100394 at *2 (4th Cir.1998) (citing *Crawford* with favor).

The questions of whether Congress acted pursuant to its powers under § 5 of the Fourteenth Amendment, or whether it could have acted under its § 5 powers, implicate the Court's recent decision in *City of Boerne v. Flores*, ___ U.S. ___, ___, 117 S.Ct. 2157, 2164, 138 L.Ed.2d 624 (1997). In *Boerne*, the Court held that Congress' power under § 5 of the Fourteenth Amendment is limited to enforcing the substantive guarantees of the Fourteenth Amendment. *Id.* at 2163. "The power granted to Congress by Section Five of the Fourteenth Amendment is limited to the promulgation of remedial or preventive legislation that enforces the provisions of the Fourteenth Amendment and does not extend to substantive legislation that defines the Amendment's restrictions on the states." *CSX Transportation*, 138 F.3d 537, 539 (citing *Boerne*, ___ U.S. at ___, 117 S.Ct. at 2164). Therefore, if § 2000d-7 is substantive rather than remedial, the statute cannot be a valid exercise of Congress's Equal Protection Clause enforcement powers. *Id.* at 540 n. 3, at *2, n. 3. It is important to note that the three Circuit courts who have held that § 2000d-7 is constitutional as a proper exercise of Congress' § 5 enforcement powers did not consider the *Boerne* case. *See Franks v. Kentucky School for the Deaf*, 142 F.3d 360

(6th Cir.1998); *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir.1998) (briefed prior to the Court's decision in *Boerne*); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir.1997) (decided prior to the Court's decision in *Boerne*).

Section 2000d-7 purports to abrogate States' immunity generally and uniformly in suits brought under Title IX, Title VI, the ADEA, the Rehabilitation Act, and "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." *See supra*, note 1. In order to determine whether Congress has the authority to abrogate the States' sovereign immunity with respect to Title IX claims, the Court must examine the purpose behind Title IX itself.

Title IX prohibits discrimination on the basis of sex by entities receiving federal funds. The language of Title IX, its legislative history, and analogous case law, demonstrate that Title IX was passed pursuant to Congress' powers under the Spending Clause.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), the Supreme Court expressly declined to determine the constitutional basis for Congress' enactment of Title IX. 503 U.S. at 75, n. 8, 112 S.Ct. 1028, 1038, n. 8, 117 L.Ed.2d 208. However, the Supreme Court has held that Title IX is analogous to Title VI, and that Title VI is Spending Clause legislation. In *Cannon v. University of Chicago*, 441 U.S. 677, 696, 99 S.Ct. 1946, 1957, 60 L.Ed.2d 560 (1979), the Court enumerated the parallels between Title IX and Title VI:

> Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word "sex" in Title IX to replace the words

> "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination. Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.

Cannon, 441 U.S. at 695-96, 99 S.Ct. at 1956-57 (citing legislative history in notes 16-19). The Court found that "Title VI is spending-power legislation." *Guardians Ass'n v. Civ. Serv. Com'n of City of N.Y.*, 463 U.S. 582, 598-99, 103 S.Ct. 3221, 3230-31, 77 L.Ed.2d 866 (1983). Reading *Cannon* and *Guardians* together, it is likely that the Supreme Court would find that Title IX is also spending-power legislation.

The Fifth and Eleventh Circuits have also found that Title IX is an exercise of Congress' spending power. *See Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1397-99 (11th Cir.1997); *Rowinsky v. Bryan Independent School Dist.*, 80 F.3d 1006, 1012-13 and n. 14 (5th Cir.1996). Both circuit courts also relied upon the Supreme Court's decisions in *Cannon* and *Guardian*, and the legislative history of Title IX. The Eleventh Circuit summarized the legislative history of Title IX in support of its argument that Title IX is spending-power legislation:

> When Congress conditions the receipt of federal funding upon a recipient's compliance with federal statutory directives, Congress is acting pursuant to its spending power. The legislative history of Title IX indicates that Congress intended to impose upon recipients of federal educational assistance a requirement of nondiscrimination on the basis of sex. The Spending Clause authorized Congress to impose this condition.
>
> Representative Green put it succinctly: "If we are writing the law, I would say that any institution could be all men or all women, but my own feeling is that they do it with their own funds and not taxpayers' funds." Representative Green also quoted with approval President Nixon, who had stated, "Neither the President nor the Congress nor the conscience of the Nation can permit money which comes from all the people to be used in a way which discriminates against some of the people." To Senator Bayh, the reach of Title IX was clearly restricted to federally funded institutions. In support of Title IX, Senator McGovern stated, "I urge my colleagues to take every opportunity to prohibit Federal funding of sex discrimination." This legislative history clearly shows that Congress intended Title IX to be a "typical 'contractual' spending-power provision."

Davis, 120 F.3d at 1397-98 (citations omitted).

This Court thus finds that it is clear that Congress enacted Title IX pursuant to its powers under the Spending Clause. Even if there is some ambiguity injected into the inquiry by the fact that Title IX addresses subject matter covered by the Fourteenth Amendment, namely

Equal Protection on the basis of sex, this Court will not "quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *See Gregory*, 501 U.S. at 469.

The Court recognizes, however, the recent body of case law, framing the proper inquiry as "whether Congress could have enacted the legislation at issue" pursuant to § 5 of the Fourteenth Amendment. *See Crawford*, 109 F.3d at 1283. *See also Franks*, 142 F.3d at ___, 1998 WL 193177; *CSX Transportation*, 138 F.3d 537, 539 (4th Cir.1998) (citing *Crawford* with favor). Because this Court finds that Congress could not have enacted Title IX, or amended Title IX by § 2000d-7 pursuant to its § 5 enforcement powers, Congress' attempt to abrogate States' Eleventh Amendment immunity for Title IX claims is unconstitutional under this test as well.

The protections afforded by Title IX differ from those afforded by the Equal Protection Clause in several important ways. First, and foremost, Title IX is voluntary in nature. Title IX prohibits discrimination on the basis of sex only by entities receiving federal funds. A state agency can discriminate if it chooses to forego federal funds. Similarly, Title IX regulates private schools who choose to receive federal funding.

> The Equal Protection Clause, however, only protects against action by state-sponsored entities. Federal funding does not make a public school a state actor. Thus, if Title IX had been enacted under the Fourteenth Amendment, then the antidiscrimination provision of Title IX would not reach federally funded schools that were not state actors. We think that the plain language of

> Title IX commands a different result: no school that receives federal funding may discriminate on the basis of gender. Therefore, we conclude that Title IX was enacted pursuant to a power that can reach non-state actors as well as state actors – the spending power.

Davis, 120 F.3d at 1398 n. 12 (citations omitted) (emphasis in original). *See also Rowinsky*, 80 F.3d at 1013 n. 14. The Court notes again the Supreme Court's recent decision in *Boerne*, that Congress' power under § 5 of the Fourteenth Amendment is limited to enforcing the substantive guarantees of the Fourteenth Amendment. *Boerne*, ___ U.S. at ___, 117 S.Ct. at 2163. It is well settled law that the Equal Protection Clause only protects against action by state-sponsored entities. *See Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948). Congress thus could not have enacted Title IX, which applies to private schools who receive federal funds, pursuant to its § 5 powers. If Congress truly intended to alter the meaning of the Equal Protection Clause, by affording protection against action taken by private entities, it would have overstepped its constitutional power in enacting Title IX. *See Boerne*, ___ U.S. at ___, 117 S.Ct. at 2164 (Congress' power under section 5 is "remedial" and designed to enforce provisions of the Fourteenth Amendment, not to "decree the substance of the Fourteenth Amendment's restrictions on the States."); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1146-47 (4th Cir.1997).

Similarly, under present judicial and executive interpretation, the substantive provisions of Title IX reach beyond the Fourteenth Amendment's prohibitions

against gender discrimination. Under Title IX, defendants face potential statutory liability for non-intentional (i.e. disparate impact) discrimination. *E.g., Jeldness v. Pearce*, 30 F.3d 1220, 1231 (9th Cir.1994) (affirming district court's holding that paying male prisoners for attending educational classes, but not paying female prisoners for attending such classes "violated Title IX, where no intent was required, but not the Equal Protection Clause"); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 832 (10th Cir.1993); *Mabry v. State Bd. of Comm. Coll. & Occ. Educ.*, 813 F.2d 311, 317 (10th Cir.1987); *Shuford v. Alabama State Bd. of Educ.*, 968 F.Supp. 1486, 1503-04 (M.D.Ala.1997); *Sharif by Salahuddin v. New York State Educ. Dept.*, 709 F.Supp. 345, 360-61 (S.D.N.Y.1989) (relying in part on the majority's decision in *Guardians Assoc. v. Civil Service Comm.*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983)). *Cf. Guardians Assoc. v. Civil Service Comm.*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (majority holding that proof of discriminatory effect suffices to establish liability when a suit is brought to enforce the regulations promulgated under Title VI, rather than statute itself). Contra, *Cannon v. University of Chicago*, 648 F.2d 1104, 1109 (7th Cir.1981). The Fourteenth Amendment, on the other hand, only recognizes intentional discrimination claims. *Washington v. Davis*, 426 U.S. 229, 241, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). Again, the substantive provisions of Title IX go beyond the Fourteenth Amendment's prohibitions against gender discrimination. Given the Court's holding in *Boerne*, legislation which alters the meaning of the Equal Protection Clause cannot be said to be enforcing the Clause. *Boerne*, ___ U.S. at ___, 117 S.Ct. at 2164. Because Title IX

alters the meaning of the Equal Protection Clause by affording protection from a greater range of defendants and by reaching a greater range of conduct, this Court finds that Title IX could not have been passed pursuant to Congress' section 5 enforcement power. Title IX was properly enacted pursuant to Congress' spending-power, and its spending-power alone. Accordingly, the portion of § 2000d-7 which purports to abrogate the States' immunity from suit in this Court for actions brought pursuant to Title IX, is unconstitutional as exceeding Congress' powers under § 5 of the Fourteenth Amendment.

C.

Plaintiff argues that, even if Congress does not have the authority to abrogate Defendant's Eleventh Amendment immunity through its powers under § 5 of the Fourteenth Amendment, Congress retained the "power of the purse" and hence control over how federal funds should be spent pursuant to its Article I Spending Clause powers.

In deciding whether Congress can properly require states to waive their Eleventh Amendment immunity and answer in federal court for claimed violations of Title IX, in return for accepting federal funding for educational programs, this Court is guided by two Supreme Court cases which address the issue of conditional waiver. In *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987), the Supreme Court was faced with a challenge to 23 U.S.C. § 158, which provided that the Secretary of Transportation should withhold a percentage

of federal funds otherwise allocable from States "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." 483 U.S. at 205, 107 S.Ct. at 2795. South Dakota permitted persons age nineteen or older to purchase beer. *Id.* South Dakota argued that 158 violates the constitutional limitations on congressional exercise of the spending power and violated the Twenty-First Amendment. *Id.* The Supreme Court held that, even though Congress might lack the power to impose a national minimum drinking age directly, encouragement to state action found in § 158 is a valid use of the spending power. 483 U.S. at 212, 107 S.Ct. at 2798.

Similarly, in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), the Supreme Court was faced with a challenge to Congressional legislation regarding the disposal of radioactive waste. 505 U.S. at 150-53, 112 S.Ct. at 2415-16. One of the provisions required the States to develop, over a seven-year period, a plan for disposal of radioactive waste generated within and to be disposed within the state. *Id.* In order to provide an incentive for the States to make progress on creating their plans, Congress set forth in the legislation a series of "milestones." *Id.* If the States met the "milestones," they would be entitled to collect federal monies. *Id.* The Supreme Court held that this portion of the legislation, placing conditions (the achievement of "milestones") on the receipt of federal funds, is a valid conditional exercise of Congress' authority under the Spending Clause. 505 U.S. at 171-73, 112 S.Ct. at 2426-27.

These cases clearly demonstrate that Congress can condition a grant of federal funds on the States' willingness to consent to be sued in federal court. The fact that Congress is acting pursuant to its powers under the Spending Clause, an Article I power, is not an impediment, even after the Supreme Court's decision in *Seminole Tribe*.

> The breadth of [Congress' Spending Clause] power was made clear in *United States v. Butler* . . . where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objects not thought to be within Article I's "enumerated legislative fields," may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

South Dakota v. Dole, 483 U.S. at 207, 107 S.Ct. at 2796 (quoting *United States v. Butler*, 297 U.S. 1, 65-66, 56 S.Ct. 312, 319, 80 L.Ed. 477 (1936)). Thus, even though the Court in *Seminole Tribe* held that Congress does not have the authority pursuant to its Article I powers to simply abrogate the States' Eleventh Amendment immunity, Congress does have the power to require the States to waive their immunity pursuant to a valid exercise of its spending power.

However, Congress' ability under the Spending Clause to require states to waive their Eleventh Amendment immunity in return for federal monies is not unlimited. This power is subject to several general restrictions.

In order to determine whether Congress can properly require the Virginia to waive its immunity for suits brought under Title IX, as Plaintiff argues, this Court will examine whether Congress has violated any of these restrictions.

First, the exercise of the spending power must be in pursuit of "the general welfare." "In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *South Dakota v. Dole*, 483 U.S. at 207, 107 S.Ct. at 2796 (citations omitted). Defendant does not argue that Title IX or the amendment contained in § 2000d-7 violates this restriction, and the Court finds that it does not.

Second, if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* (quoting *Pennhurst*, 451 U.S. at 17, 101 S.Ct. at 1540); *Virginia Dept. of Educ. v. Riley*, 106 F.3d 559, 566 (4th Cir.1997) (en banc). Defendant GMU argues that there is nothing in the text of Title IX or 42 U.S.C. § 2000d-7 which conditions the receipt of federal funds on the States' waiver of the Eleventh Amendment. GMU argues that, in the absence of such clear and unambiguous explicit statutory language, this Court cannot infer such a condition.

Plaintiff disagrees, and argues that under Title IX and § 2000d-7 it is abundantly clear that one of the conditions placed by Congress upon acceptance of federal funds

under Title IX is the loss of Eleventh Amendment immunity. Section 2000d-7 provides in pertinent part: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . Title IX . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal fund assistance." 42 U.S.C.A. § 2000d-7 (1994). The Court finds that this language is a clear and unequivocal expression of Congress' intent to condition the acceptance of federal funds on the States' agreeing to submit to the jurisdiction of the federal courts. The United States points to the legislative history of § 2000d-7, which supports this finding as well. "To the extent that the proposed amendment [§ 2000d-7] is grounded on congressional spending powers, [§ 2000d-7] makes it clear to states that receipt of Federal funds constitutes a waiver of their Eleventh Amendment immunity." Brief of the United States in Intervention (citing 131 Cong.Rec. at 22,346; 132 Cong.Rec. at 28,624).

The third restriction on Congress' spending power is that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *South Dakota v. Dole*, 483 U.S. at 207, 107 S.Ct. at 2796 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461, 98 S.Ct. 1153, 1164, 55 L.Ed.2d 403). The Court finds that Title IX and § 2000d-7 easily satisfy this requirement, and Defendant does not argue otherwise.

Fourth, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." 483 U.S. at 208, 107 S.Ct. at 2796. Defendant GMU argues that this requirement means that Congress cannot

demand that the States surrender their Eleventh Amendment immunity as a condition of receiving federal funds. GMU cites *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984), in which the Supreme Court held that Congress could not demand that noncommercial television stations refrain from editorials as a condition of receiving federal funds. This Court finds the Federal Communications case is inapposite.

> The "independent constitutional bar" limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power.

483 U.S. at 210-11, 107 S.Ct. at 2798. Because it is perfectly constitutional for a state to waive its Eleventh Amendment immunity, Congress' conditioning a state's receiving federal funds upon condition that it waive its Eleventh Amendment immunity, does not violate the "independent constitutional bar" limitation.

Finally, the Supreme Court has "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' " 483 U.S. at 211,

107 S.Ct. at 2798 (quoting *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 892, 81 L.Ed. 1279 (1937)). In *South Dakota v. Dole*, the Court found that all South Dakota would lose if it chose to keep its minimum drinking age at nineteen, rather that at age twenty-one as Congress desired, was 5% of the funds otherwise obtainable under specified highway grant programs. *Id.* Defendant does not argue that the financial inducement provided by federal monies offered under Title IX funding are so great as to be coercive, nor has Defendant provided the Court with any evidence of the amounts of money provided to the States for educational programs which are required to comply with Title IX. This Court, therefore, cannot find that the inducement offered by Congress can be called "coercive" in this case.

The Court will briefly mention Defendant's final argument with regards to the waiver issue. GMU argues that the mere receipt of federal funds does not constitute waiver of the Eleventh Amendment, and that waiver must be overt and explicit (such as a statutory declaration by the General Assembly) GMU argues that waiver cannot be implied. Quite the contrary, waiver may be implied, but only where the Congressional legislation at issue is clear that it is conditioning receipt of the federal funds on the waiver. As the Court discussed, *supra*, through enactment of § 2000d-7, Congress clearly indicated its intent to condition the States' receipt of federal funds upon an accounting for the spending of those funds in federal court.

Under Title IX and 42 U.S.C. § 2000d-7, properly enacted pursuant to Congress' powers under the Spending Clause, it is clear that one of the conditions placed by

Congress upon acceptance of federal funds under Title IX is the waiver of Eleventh Amendment immunity. Accordingly, Defendant's 12(b)(1) Motion to Dismiss Counts I and II for lack of subject matter jurisdiction is DENIED.

III.

Defendant Dean Girard Mulherin ("Mulherin") has filed a Motion for Summary Judgment, arguing that no disputed facts remain regarding Count IV.

A.

Summary judgment is proper if, viewed in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir.1985). The nonmoving party is entitled to the most favorable inferences that may reasonably be drawn from the forecast evidence, *Ross*, 759 F.2d at 364, but it "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir.1985). The essence of the inquiry the court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2511-12, 91 L.Ed.2d 202 (1986). Summary judgment is proper "if the evidence is such that

a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* at 248.

B.

In its Order dated January 22, 1998, this Court denied Mulherin's Motion to Dismiss this due process claim. The Court denied Mulherin's motion at that time because Litman had alleged in her Complaint that, "[a]t the conclusion of the first day of the proceedings, and prior to the presentation of Litman's defense, a board member stated, 'I will make it clear that no new evidence will be presented. All evidence in this case is before us right now.' " Complaint at ¶ 97. This Court found that, if Plaintiff's allegations were true and it were also true that Litman did not have the opportunity to present her side during the first day of the hearing or at some other time, then this would be a clear due process violation of which a person in Dean Mulherin's position as Judicial Administrator should have known.

After the January 22 Memorandum Opinion and Order was mailed to the parties, counsel for Plaintiff mailed a letter to this Court:

> I write to bring to the Court's attention an apparent misunderstanding of the facts alleged by the Plaintiff in regard to the above referenced matter.
>
> At page seventeen of the Court's Memorandum Opinion of January 22, 1998, the Court denied Defendant Mulherin's Motion to Dismiss based upon the Court's belief that the Plaintiff had no opportunity to present her defense to the Student Judicial Board at her expulsion hearing.

> . . . [I]t was not and is not Litman's position or allegation that she was entirely precluded from presenting her defense.

Letter from Annette Kay Rubin, counsel for Plaintiff, dated January 28, 1998.

The Court finds that the pertinent facts are thus no longer in dispute. Although Litman was not allowed to put on as much evidence as she would have liked, it is now uncontroverted that she was allowed to testify for several hours. Accordingly, Dean Mulherin's Motion for Summary Judgment is GRANTED.

IV.

Plaintiff Litman asks this Court to exclude certain healthcare providers from the requirement of preparing a written report pursuant to Fed.R. of Civ.P. 26(a)(2)(B). Litman argues that only her treating physicians will be called to testify as to their diagnosis, observations, and opinions with respect to her medical and mental health in accordance with their treatment records of her. Plaintiff states that none of the physicians will be asked to testify as to matters outside the scope of their examination and treatment of the Plaintiff. Defendant Norris objects, and argues that it is unfair to "permit a party to employ a physician who treated an injured party to provide testimony extending beyond simply the care of the plaintiff to classic expert opinion regarding causation and prognosis" without submitting an expert report. Response on Behalf of Defendant Eugene M. Norris in Opposition to Plaintiff's Motion to Exclude Healthcare Providers from the Requirement of Preparing a Written Report Pursuant

to Fed.R.Civ.P. 26(a)(2)(B) at 2 (citing *Thomas v. Consolidated Rail Corp.*, 169 F.R.D. 1 (D.Mass.1996)).

The Court finds a recent decision from the Norfolk Division of this Court instructive:

> If a treating physician forms an opinion of the causation of an injury to a patient and the prognosis of the patient's condition during the treatment then such opinion may be expressed by the treating physician without the necessity of a report under Fed.R.Civ.P. 26(a)(2)(B). . . . Defendants may still discover those opinions through interrogatories, requests for production of documents, and depositions of the treating physicians. However, if a physician, even though he may be a treating physician, is specially retained or employed to render a medical opinion based on factors that were not learned in the course of the treatment of the patient, then such a doctor would be required to present an expert written report.

Hall v. Sykes, 164 F.R.D. 46, 48-49 (E.D.Va.1995).

Plaintiff has represented to this Court that the treating physicians who will testify at trial will confine their testimony to factors which were learned in the course of their treatment of Plaintiff. If the testimony were to go beyond this at trial, and expert reports had not been filed, it would be proper to exclude this portion of the testimony at that time in trial. Accordingly, Plaintiff's Motion to Exclude Healthcare Providers from the Requirement of Preparing a Written Report Pursuant to Fed.R.Civ.P. 26(a)(2)(B) is GRANTED.

V.

Plaintiff also asks this Court to amend and reverse its holding with respect to Count III of her Complaint, alleging Deprivation of Free Speech Rights, and with respect to Count V, alleging Deprivation of Equal Protection Rights, each against Defendants Orsak and Mulherin.

With regards to this Court's dismissal of Count III, Litman argues that this Court erroneously applied the "public concern" test, which governs free speech in an employer/employee state relationship, and not the test in *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), which governs student protected speech and gives the state the power to control students' speech only if it "substantially interferes with school discipline or the rights of others." Even if this Court analyzed Litman's claim by looking at the Court's holding in *Tinker*, the Court would still dismiss Count III. Again, this Court dismissed Count III based on a finding that Orsak and Mulherin were entitled to qualified immunity. The Supreme Court in *Tinker* stated that "conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513, 89 S.Ct. at 740. Part of the qualified immunity test is whether a reasonable person in the defendant's position would have known that his actions violated the plaintiff's First Amendment rights. *See Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir.1992). Defendants in this case could reasonably have viewed Litman's actions of sending numerous e-mails and other

writings to professors regarding her claims of sexual harassment as highly disruptive of the professors' work, and thus are entitled to qualified immunity even under the standard Plaintiff urges this Court to accept. Accordingly, Plaintiff's Motion to Reconsider the dismissal of Count III is DENIED.

Plaintiff's Motion to Reconsider the dismissal of Count V is without merit and is, accordingly, DENIED.

ORDER

For the reasons stated in the Memorandum Opinion, it is hereby ORDERED that:

(1) Defendant George Mason University's Motion to Dismiss Counts I and II is DENIED;

(2) Defendant Dean Girard Mulherin's Motion for Summary Judgment is GRANTED;

(3) Plaintiff's Motion to Exclude Treating Healthcare Providers from the Requirement of Preparing a Written Report Pursuant to Fed.R.Civ.Pro. 26(a)(2)(B) is GRANTED;

(4) Plaintiff's Motion to Reconsider the Court's ruling dismissing her Equal Protection claim as to Defendants Orsak and Mulherin is DENIED;

(5) the Clerk of the Court shall forward copies of this Order and Memorandum opinion to all counsel of record.

MOTION FILED
DEC 3 - 1999

(2)

No. 99-596

In the
Supreme Court of the United States

GEORGE MASON UNIVERSITY,
Petitioner,

v.

UNITED STATES OF AMERICA and
ANNETTE CRECO LITMAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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24K

QUESTION PRESENTED

May Congress require a state to waive its sovereign immunity as a condition of receiving federal funds?

MOTION AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Pacific Legal Foundation respectfully submits this motion for leave to file a brief amicus curiae in support of the petition for writ of certiorari.[1] Written consent was granted by counsel for the Petitioner and Respondent United States and lodged with the Clerk of this Court. Counsel for Respondent Annette Litman has withheld consent.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. PLF litigates nationwide with the support of thousands of citizens from coast to coast.

In its fight to protect basic liberties, PLF becomes involved in cases that raise important public policy considerations that may create significant legal precedents. This is a case of great public importance because this Court is asked to reassess its interpretation of the spending power. Under current Supreme Court precedent, Congress may attach virtually any condition on a grant of federal funds to the states. This has caused an imbalance in our federal form of government that makes a nullity of the Tenth Amendment and a mockery of the Framer's promise of a limited central government. Any decision this Court makes, even a decision not to review, will either foster or undermine the Constitution's federalist design. Therefore, this

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[1] In accordance with Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

case has far reaching implications and warrants input from a broad spectrum of public interests.

PLF has litigated many cases dealing with constitutional interpretation and is a frequent amicus participant in this Court. PLF's public policy perspective will provide a necessary viewpoint on the issues presented in this case. Therefore, PLF respectfully requests that this Court grant PLF's motion to file the attached amicus curiae brief in this case.

DATED: December, 1999.

Respectfully submitted,

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TABLE OF CONTENTS

Page

QUESTION PRESENTED i

MOTION AND INTEREST OF AMICUS CURIAE ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE VIRTUALLY UNLIMITED ABILITY OF CONGRESS TO CONDITION THE RECEIPT OF FEDERAL FUNDS UNDERMINES THE FEDERALIST DESIGN OF THE CONSTITUTION 4

II. WITHOUT MEANINGFUL LIMITS ON FEDERAL SPENDING THE CONCEPT OF ENUMERATED POWERS IS ILLUSORY 7

III. CONDITIONS ON FEDERAL FUNDS ARE OFTEN COERCIVE 10

IV. THIS COURT HAS NOT PROVIDED ANY CONSISTENT AND PRACTICAL STANDARDS FOR DETERMINING THE SCOPE OF CONGRESS' POWER UNDER THE SPENDING CLAUSE 13

V. THE WRIT OF CERTIORARI SHOULD BE GRANTED TO PREVENT AN "END RUN" AROUND THIS COURT'S RECENT DECISIONS UPHOLDING FEDERALIST PRINCIPLES 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Bennett v. Spear, 520 U.S. 154, 117 S. Ct. 1154 (1997) 2

Berman v. Parker, 348 U.S. 26 (1954) 8

Buckley v. Valeo, 424 U.S. 1 (1976) 8

Federal Communications Commission v. League of Women Voters, 468 U.S. 364 (1984) 14-16

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 10

Gregory v. Ashcroft, 501 U.S. 452 (1991) 6

Helvering v. Davis, 301 U.S. 619 (1937) 8

New York v. United States, 505 U.S. 144 (1992) 16

Printz v. United States, 521 U.S. 898 (1997) 17

South Dakota v. Dole, 483 U.S. 203 (1987) 8-9, 13-14

Steward Machine Company v. Davis, 301 U.S. 548 (1937) 8, 15

United States v. Butler, 297 U.S 1 (1936) 8

United States v. Lopez, 514 U.S. 549 (1995) 18

Virginia Department of Education v. Riley, 106 F.3d 559 (4th Cir. 1997) 10, 12-13

United States Constitution

Tenth Amendment 5

Eleventh Amendment. 2

STATEMENT OF THE CASE

This case involves a sexual harassment claim. Annette Litman alleged she was harassed by Dr. Eugene Norris for whom she worked as a research assistant while a student at George Mason University. A faculty panel found that Dr. Norris had not violated the University's sexual harassment policy and imposed no disciplinary sanctions, although Dr. Norris was directed to have no further contact with Ms. Litman.

About this same time, two faculty members filed complaints against Ms. Litman for sexual harassment. Ms. Litman was found to have violated University policy. She was barred from taking additional classes and forbidden to enter campus. Ms. Litman sued these faculty members and the University in federal court. Her claims against the University included: (1) that the University violated Title IX of the Education Amendments of 1972 because Dr. Norris harassed her, and (2) the University violated Title IX because University employees filed unwarranted charges against her.

The University moved to dismiss on sovereign immunity grounds arguing the following statutory provision--a condition on the receipt of federal funds--is an unconstitutional abrogation of states' rights.

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statutes prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1) (citations omitted).

The United States intervened to defend the constitutionality of this provision. The Fourth Circuit ruled in favor of the United States holding that the conditioning of federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is permissible. The University now petitions the United States Supreme Court to restrict Congress' ability to condition federal funding on waivers of sovereign immunity.

SUMMARY OF THE ARGUMENT

The Framers of the Constitution envisioned a national government of limited powers. This limitation on federal authority was designed to keep a proper balance between local and national interests and to protect the sovereign states from undue interference by a central government. As a safeguard to tyranny from either government, this balance was made express in the Tenth Amendment. However, the ability of Congress to place virtually any condition on the receipt of federal funds nullifies the Framer's promise of a limited central government and destroys the intent of the Tenth Amendment.

This Court has all but abdicated to Congress the role of defining federal power under the Spending Clause rendering the concept of enumerated powers illusory. In addition, two other factors contribute to Congress' ability to use the spending power to further virtually any federal objective and intrude into state and local interests. First, Congress can tax income at will and be assured of an almost limitless supply of money. And, second, restrictive standing rules essentially insulate federal spending actions from court review.

Because of increasing reliance by states on federal funds and the federal government's dependence on taxes from the states' citizens, the states are not free to reject conditional federal funds. Federal grants amount to billions of dollars a year and comprise a significant portion of state and local budgets.

Conditions on federal funds are pervasive and may even alter state structures. Indeed, every grant of federal funds comes with at least 59 regulatory conditions that bear little resemblance to the funds' purposes. Such conditions are often coercive and allow Congress to effectively "regulate" the states indirectly where Congress could not regulate directly.

This Court has not provided any meaningful standards for determining the scope of the spending power. In fact, after *South Dakota v. Dole*, wherein this Court upheld broad conditions on the receipt of federal funds, legal scholars agree that the the federal government can no longer be considered a government of limited, enumerated powers. Additionally, this Court's spending power jurisprudence is inconsistent allowing the impression that a condition on federal funds will stand or fall on the personal inclinations of the justices.

Finally, although this Court has resuscitated the principles of federalism in its recent decisions such as *New York v. United States* and *Printz v. United States*, the Court has left a gaping hole in the federalist structure by not addressing the scope of the spending power. Congress can effectively override the decisions of this Court through conditions on federal funds. Three days after this Court invalidated the Gun Free School Zones Act in *United States v. Lopez* for exceeding Congress' power under the Commerce Clause, President Clinton declared Congress could require the states to enforce the law as a condition on federal funds.

If the federalist design of the Constitution is to mean anything, this Court must set some workable limits on Congress' power to "regulate" the states by coercive conditions on federal funds. Therefore, this Court should grant the writ of certiorari.

ARGUMENT

I

THE VIRTUALLY UNLIMITED ABILITY OF CONGRESS TO CONDITION THE RECEIPT OF FEDERAL FUNDS UNDERMINES THE FEDERALIST DESIGN OF THE CONSTITUTION

This is a case of national importance; it raises fundamental questions about the balance of power between the federal and state governments. Because this Court has not established the contours of the spending power--although it has hinted some limits apply--Congress' ability to condition the receipt of federal funds is virtually unfettered. Such conditions may bear little semblance to the purpose of the funds and expose the states to coercive sanctions for failure to comply. By this means, Congress effectively "regulates" the states in ways the Framers could never have envisioned or intended and which far exceed the limits of its enumerated powers. The result is a weakened state soveriegn and an imbalance in the federal structure.

The constitutional debates were animated by the question of where to draw the line between a national government and state autonomy. The Federalist Papers, which sprang from those debates, were an attempt to elucidate where this line should be drawn. The Framers envisioned a limited government bounded by the Constitution's enumerated powers. This limitation on federal authority was devised by the Framers to keep a proper balance between local and national interests and to protect the united, but sovereign, states from heavy-handed interference by a central government. However, the states wanted further assurance of their independant sovereignty. Therefore, eight of the nine states required for ratification insisted on an express statement of states' rights before they would ratify the Constitution. *See* Douglas W. Kmiec, *Commerce, The Tenth Amendment, and Guns in Schools, Update on Law-Related Education*, 4 (1995). That statement

now appears as the Tenth Amendment to the United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

These words are not precatory. Rather, they define substantively the pragmatic balanced federal structure that would protect state sovereignty from federal encroachment. The Tenth Amendment memorializes the principles of the federalist design; the bed-rock foundation on which this Nation would be built. As James Madison declared: "The powers delegated by the proposed Constitution to the Federal Government, are few and defined" and "[t]hose which are to remain in the State Governments are numerous and indefinite." The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

Clearly, the Constitution calls for a balance between state and federal powers. But, a discussion of the federalist design necessitates a consideration of the reasons behind this directive. Ryan Squire suggests some important reasons for our federalist form of government. *See* Ryan C. Squire, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole*, 25 Pepp. L. Rev. 869 (1998). Squire argues that a proper balance between state and federal governments protects individual liberties and guards against the blurring of political accountability.

Squire cites Alexander Hamilton for the view that the federalist design protects against "the attempts of (either) government to establish a tyranny." *Id.* at 877.

> Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and

> these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress.

The Federalist No. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

James Madison held a similar view. For him a separation of powers was a "double security" to protect the liberties of the people. Squire at 878. Justice O'Connor endorsed this view in *Gregory v. Ashcroft* when she stated: "If this 'double security' is to be effective, there must be a proper balance between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991). Justice O'Connor concluded: "In the tension between federal and state power lies the promise of liberty." *Id.*

Squire believes the premise underlying the principles of federalism is "one of political accountability" and awareness. Squire at 879. According to Squire, to allocate their favor, the citizens must be able to determine which of the two governments is accountable for a given action. *Id.* He warns that if the scales of power between the national and state powers is tipped too far in one direction, the spheres of state and federal government would be blurred making political responsibility illusory. *Id.* "Citizens would be uncertain whom to hold responsible for disfavored actions." *Id.* For example, if the federal government tips the scales in its own direction by coercing state and local officials to regulate according to federal dictates, so that these officials cannot regulate according to local views and interests, the federal government may insulate itself from public disapproval by leaving the state and local officials to take the brunt of the actions. *Id.* at 879-80.

> Thus, a proper balance between federal and state authority helps to ensure that citizens are able to hold accountable those state or federal officials responsible for disfavored actions and implicitly ensures not only that the federal and state officials will be responsive to the needs of their respective electorates, but that the officials will indeed have the ability to be responsive to their electorates. Indeed, a properly balanced system of federalism ensures liberty by maintaining local self-governenace. In our republican democracy, in which citizens choose their representatives, few things are as important as political accountability.

Id. at 880-81.

As important as federalism is for the protection of individual liberties, the designated federal structure is at serious risk today. The core principles of federalism are undermined by the constant erosion of ever-expanding federal power under the Spending Clause. The ability of Congress to place almost any condition on the receipt of federal funds nullifies the Framer's promise of a limited central government and destroys the intent of the Tenth Amendment. Thus, Justice Scalia argues the issue of the spending power's encroachment on the state and federal balance is one of the most serious issues now facing federalism. Squire at 933.

Indeed, the issue is serious and should be addressed by this Court.

II

WITHOUT MEANINGFUL LIMITS ON FEDERAL SPENDING THE CONCEPT OF ENUMERATED POWERS IS ILLUSORY

Squire forcefully argues that expansion of the spending power in the twentieth century has made illusory the protections

of state sovereignty and the attendant safeguards against tyranny. Squire at 870. He maintains that this Court made a wrong turn in *United States v. Butler*, 297 U.S 1 (1936), when it interpreted the spending power broadly, in the mold of Alexander Hamilton, as restricted only by the General Welfare Clause, rather than more narrowly, as James Madison envisioned, as limited by the Constitution's enumerated powers. Squire at 870-71.

Madison believed that permitting Congress to spend for the general welfare effectively empowered Congress to legislate generally; that is, in purely state and local matters. *See* H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 Va. L. Rev. 689, 729 n.159 (1994). In support of this belief, Madison observed that virtually every act of Congress involves money and bears some relation to the general welfare. Squire at 909. Madison concluded, therefore, that "a government with the power to spend for any purpose coming within the notion of general welfare 'is a government without the limitations formed by a particular enumeration of powers.'" Powell at 729 n.159.

Squire argues that in *Steward Machine Company v. Davis*, 301 U.S. 548 (1937), *Helvering v. Davis*, 301 U.S. 619 (1937), and *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court deferred to Congress to define the general welfare thereby granting Congress almost unlimited spending power. Squire at 871. Further, in *Berman v. Parker*, 348 U.S. 26 (1954), this Court effectively held that when Congress spends it is presumed to spend in furtherance of the general welfare. Squire at 871. Finally, in *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court held that Congress could condition the receipt of federal funds as long as the condition reasonably relates to a particular federal program. Squire at 871. But, in her dissent, Justice O'Connor argues it is enough under the Court's standard only to establish some relationship, reasonable or not. *Id.* Justice O'Connor observed further:

> If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."

Dole, 483 U.S. at 217 (citations omitted)

Squire contends two additional factors allow Congress to use the spending power to intrude into state and local interests. First, under the Sixteenth Amendment, Congress can tax income at will, thereby guaranteeing itself an almost unlimited supply of money to spend for its own purposes. Squire at 871. Second, due to restrictive standing rules, taxpayers have little, if any, ability to challenge federal spending in the courts. *Id.* This argument that Congress can tax and spend essentially at will is no doubt premised on the recognition that there is a practical limit to the taxes that government can exact from its citizenry. It is axiomatic that every dollar that goes into the federal coffer is one less dollar available for the state coffers. Moreover, the people have a right to expect a return on their federal taxes and shouldn't have to pay twice for the same service--once to the federal government and once to the state.

"Thus, the Court effectively permits Congress to use spending power means to achieve any desired ends." *Id.* at 911-12. A similar observation prompted Madison to remark, "it must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution, limited powers." Powell at 663 n.58. In Madison's view, therefore, the ability to legislate either by unlimited powers or by unlimited means (such as by placing regulatory conditions on

the receipt of federal funds) would grant Congress the ability to legislate generally. And, indeed it does.

III

CONDITIONS ON FEDERAL FUNDS ARE OFTEN COERCIVE

The notion that the states are free to refuse federal funds and avoid an onerous condition is a fiction. As Justice Luttig observed, "the several States have become increasingly dependent upon the Federal Government for funds, because the Federal Government has increasingly become dependent upon the revenues from taxation it receives from the citizens of the several States." *Virginia Department of Education v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (dissenting opinion).

Indeed, each year federal funds are becoming a larger portion of each state's revenue. These funds run to billions of dollars and none of this federal money is given without conditions. *See* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911 (1995). Almost 15 years ago in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court observed that in the past 25 years federal grants had increased by more than ten fold and accounted for about 20% of state and local government expenditures. *Id.* at 552-53. Whether for practical or political reasons, the evidence shows empirically that the states are dependent on federal funds. Congress recognizes this fact. It knows as a practical matter that the states have little choice but to accept numerous and heavy-handed conditions on federal funds.

Donald Mizerk reports that at least 59 conditions attach to every federal grant to the states:

> These policy objectives include antidiscrimination requirements regarding race, religion, handicaps, and gender; sixteen rules protecting the United States'

> cultural and physical environment; rules concerning the use of American ships, planes, and companies in the implementation of grant activities; employment rules; accounting and management rules; freedom of information rules; and 'right of privacy' rules. . . . A state, by accepting one grant, opens the flood gates for federal restrictions on the state's general activities.

Donald J. Mizerk, *The Coercion Test and Conditional Federal Grants to the States*, 40 Vand. L. Rev. 1159, 1171 (1987).

According to Mizerk, although some states may willingly accept such wholesale limitations on their sovereignty, many states do so only reluctantly in their need. For example, some state laws require the state to revert to the favored state policy when a condition is invalidated. *Id.* at 1172. Similarly, the State of Nevada enacted a law that raised the state's maximum speed limit to 70 miles per hour. However, the state was required to reduce the limit to 55 miles per hour when the Department of Transportation threatened to recall the state's highway grant if it didn't comply with the federal policy. *Id.*

Congress' use of conditions on federal funds has even altered the structure of state governments. *Id.* at 1173. Mizerk notes, for example, some conditions require the establishment of state agencies to implement the federal program. *Id.* At one time, North Carolina was required to amend its constitution to allow for the establishment of a new health department. *Id.*

Mizerk maintains that spending conditions can also disrupt separation of powers within a state by circumventing the state's appropriation process and depriving the Legislature the ability to control state revenues. *Id.* Some federal programs even dictate the very people who will administer the program. *Id.* Although these factors suggest good reasons for the states in the first instance to reject conditional federal grants, the maintenance of ongoing programs becomes increasingly more

dependent on federal funds--funds the states may not lightly pass over.

> The pressure on states to cooperate with grant conditions is even more apparent when Congress attaches conditions to existing federal benefits. Having accepted the federal benefit with the original set of limited conditions, a state often comes to rely on the presence of the benefit. The state may have structured its services and budget to accommodate the program and the original conditions or may have planned future projects and expansion around federal incentives. Because of the state's reliance on the program, rejecting the federal grant would place the state in a worse position than before Congress imposed the new condition.

Mizerk at 1174.

Additionally, the coercive nature of conditional federal funds is heightened when the conditions are unrelated to the purpose of the funds. Of the 59 conditions noted above, Mizerk remarks: "These conditions generally have little to do with any spending program, but rather 'are part of the fabric of an overriding national policy.'" *Id.* Such conditions become particularly odious when the sanctions for noncompliance are grossly out of proportion to the violation.

In *Virginia Department of Education v. Riley*, 106 F.3d 559, for instance, the federal government gave the states money to educate disabled students on the condition the states "assure all children with disabilities the right to a free appropriate public education." *Riley*, 106 F.3d at 560. Thus, the federal government withheld the state's *entire* $60 million dollar grant when Virginia expelled 126 students "for reasons wholly unrelated to their disabilities." *Id.* The Fourth Circuit held that withholding the entire grant, rather than a pro rata share that would be available for the expelled students--$58,000, was not

"encouragement", as the federal government claimed, but rather "begins to resemble impermissible coercion." *Id.* at 569.

As a practical matter, rarely is the acceptance of conditions on federal funds "voluntary" in a meaningful sense. The result is an overreaching federal government and a weakened state sovereign. Therefore, to protect state powers and the federalist design, this Court should grant review and set some overdue limits on Congress' spending powers.

IV

THIS COURT HAS NOT PROVIDED ANY CONSISTENT AND PRACTICAL STANDARDS FOR DETERMINING THE SCOPE OF CONGRESS' POWER UNDER THE SPENDING CLAUSE

In 1987, this Court decided the case of *South Dakota v. Dole*, 483 U.S. 203. That case posed the question whether the receipt of federal highway funds could be conditioned on the state's adoption of a minimum drinking age. This Court upheld the condition concluding that Congress could use conditional offers of federal funds to "regulate" the states indirectly in ways it could not do directly, thus affirming that Congress' power under the Spending Clause is not limited to its other powers enumerated in the Constitution.

Since the decision in *Dole*, many legal scholars have criticized this Court for allowing Congress seemingly limitless power to "negotiate" with the states over federal funds. Professor Lynn Baker notes that three general concerns have been repeatedly raised. Baker at 1932. First, legal scholars have observed that limits on Congress' ability to regulate can be circumvented through the taxing and spending powers. *Id.* at 1933. In fact, after *Dole*, no scholar seriously contends that the federal government is one of limited powers. *Id.*

Second, legal scholars are skeptical of the "constraints" on the spending power this Court identified in *Dole*. *Id.* Although

this Court suggested in *Dole* that Congress could not use the spending power to unduly coerce the states or to impose conditions "unrelated 'to the federal interest in particular national projects or programs,'" most scholars agree that decision did not provide a workable definition of these standards. *Id.*

And third, to the extent *Dole* defers to the political process to act as a check on conditions of federal spending, legal scholars question the ability of the states to protect themselves from Congress within that process. *Id.* Professor Albert Rosenthal argues that because "[a] continued high level of federal financial assistance will often be of great importance to state and local governments . . . these governments may not find it politically expedient to dilute their efforts to obtain such funds by simultaneously campaigning against the conditions, however objectionable they may appear to be." Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan. L. Rev. 1103, 1141 (1987). And, as Baker reports, Professors Thomas McCoy and Barry Friedman posit that because a state may reject the conditioned federal funds, voters will attribute the result of the conditions to state officials rather than to their federal counterparts. Baker at 1934. Thus, they argue, the voters are unlikely to discern any abuse of congressional power. *Id.* They conclude, therefore, that federal officials will not be held accountable. *Id.*

Of equal concern is this Court's vacillating Spending Clause doctrine. A comparison of this Court's ruling in *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984), with the ruling in *Dole* illustrates the uncertainty that pervades the Court's spending power jurisprudence. In *League of Women Voters*, this Court invalidated a 1981 amendment to the Public Broadcasting Act of 1967 that established a nonprofit corporation to distribute federal funds to noncommercial television and radio stations. The amendment conditioned the funds by requiring that the

stations not engage in "editorializing." This Court analyzed the case as it would a direct regulation rather than as a condition on federal funds and struck down the amendment as an abridgment of the freedom of the press. Mizerk at 1182.

In his dissent, however, then Associate Justice Rehnquist did analyze the case as a spending power issue. *Id.* He concluded that the stations knew of the condition when they accepted the federal money and, therefore, the condition was valid. *Id.* According to Mizerk, while both the dissent and majority addressed first amendment concerns, traditional spending power analysis would have ignored first amendment implications. *Id.* at 1182-83. As far back as *Steward Machine Co. v. Davis*, 301 U.S. 548, this Court held that virtually any condition attached to federal funds is permitted because the state can decline the grant and protect its sovereignty.

Thus, in *League of Women Voters*, Justice Rehnquist argued that Congress had a legitimate purpose in conditioning grants to noncommercial broadcasting stations. Mizerk at 1183. Likewise, in *Dole*, Chief Justice Rehnquist stated that Congress had a legitimate purpose in conditioning federal highway monies on drinking age limitations. Mizerk at 1183. So long as the states could reject the federal grants, and avoid the conditions, the content of the conditions was all but irrelevant. *Id.* As Mizerk points out, however, what proved to be a consistent approach for Justice Rehnquist, was a complete about face for this Court; Justices Marshall, Powell, and Blackmun applied the same reasoning in *Dole* that they had previously rejected in *League of Women Voters*. *Id.* at 1183-84.

> The impression that emerges from the Justices' ambivalence is that the Court will either agree or disagree with the contested condition depending on the individual Justices' subjective inclinations. With that, the analysis has plunged into a Lochnerian abyss with the coercion test being selectively reintroduced

> when the Court wishes to uphold the condition or forgotten when the Court wishes to strike it down.

Id. at 1184.

This Court is of an uneven temperament when it comes to spending power analysis. Without clear guidance from this Court, it is impossible for Congress, the states, or the lower courts to know how to resolve disputes over the conditioning of federal funds. To clarify the applicable legal standards, this Court should grant review.

V

THE WRIT OF CERTIORARI SHOULD BE GRANTED TO PREVENT AN "END RUN" AROUND THIS COURT'S RECENT DECISIONS UPHOLDING FEDERALIST PRINCIPLES

Recent Supreme Court decisions show a decided interest by this Court in reestablishing the federal-state balance of power the Framers envisioned. However, this Court's failure to address limits on federal spending threatens to undo those decisions as well as the federalist structure.

New York v. United States, 505 U.S. 144 (1992), is a pivotal case in restoring limits on federal power. *See* Squire at 883. In that case, this Court invalidated a provision of the Low-level Radioactive Waste Policy Amendments of 1985 that required the states to provide for the disposal of certain wastes generated within their borders. To "encourage" compliance with this law, Congress gave the states money for meeting established timetables and authorized compliant states to charge out of compliance states quadruple the normal surcharge for receiving wastes. These provisions of the Act were upheld because Congress may condition the receipt of federal funds and Congress may give states the choice to regulate according to federal dictates or to be preempted by federal law. *New York*, 505 U.S. at 178.

However, this Court declared the "take-title provision" invalid. That provision imposed state liability for all damages resulting from failure to take possession of the waste generated within the state's borders. That provision left the states in an untenable position. They could either take possession of the waste generated within their borders or regulate the waste as directed by the federal government. In either event, the state was commandeered to do the bidding of the federal government. This Court struck down the "take-title provision" as beyond the scope of congressional power remarking that it crossed the "line distinguishing encouragement from coercion." *Id.* at 174-76.

In *Printz v. United States*, 521 U.S. 898 (1997), this Court again faced attempts by Congress to co-opt the states and expanded on its holding in *New York*. *See* Squire at 889. *Printz* involved a challenge to the Brady Handgun Violence Prevention Act. The Act required firearms dealers to obtain personal information on firearms purchasers and provide this information to the local chief law enforcement officer. This officer was required to do a background check on each prospective purchaser before the sale was completed. But this Court invalidated this requirement holding that Congress could not conscript state law enforcement officers to participate in the administration of a federally enacted regulatory scheme. *Printz*, 521 U.S. at 935. Writing for the majority,

> Justice Scalia first announced the oft-cited and "incontestable" principle that "the Constitution established a system of 'dual sovereignty.'" The majority reiterated that "although the States surrendered many of their powers to the new Federal Government," the text of the Constitution reflects the fundamental understanding that the states nevertheless "retained 'a residuary and inviolable sovereignty.'" Perhaps most importantly, "[r]esidual state sovereignty was . . . implicit, of course, in the

> Constitution's conferral upon Congress of not all government powers, but only discrete, enumerated ones . . . which implication was rendered express by the Tenth Amendment." Moreover, "the Framers rejected the concept of a central government that would act upon and through the States."

Squire at 892-93.

These cases demonstrate this Court's commitment to the Constitution's federalist design. However, this Court has left a gaping hole in the federalist structure by not defining the constitutional scope of conditional spending. Indeed, while this Court is shoring up the power of the states, the federal government is tearing it down. This Court's landmark decision in *United States v. Lopez* illustrates the point.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court invalidated a congressional Act promulgated under the Commerce Clause for the first time in almost 60 years. See Squire at 887. That case involved a challenge to the Gun Free School Zones Act that made it a federal crime to possess a gun near a school. Relying on established principles of federalism, Chief Justice Rehnquist held the Constitution required the federal government to regulate only within its enumerated powers. This Court found the possession of a handgun near a school had nothing to do with "commerce" or "any sort of economic enterprise" and the Act exceeded the limits of federal power. *Lopez*, 514 U.S. at 561. In his concurring opinion, Justice Kennedy observed that to hold such activity commercial would blur the boundaries of power between the state and federal governments. *Id.* at 577.

But no sooner had this Court spoken than federal regulators found a way to override the decision with a condition on federal funds. Professor Baker reports that three days after this Court's ruling in *Lopez*, President Clinton declared that he was "determined to keep guns out of our schools," suggesting

that Congress would not violate the Constitution if it now chose to "encourage" states to ban guns from school zones "by linking Federal funds to enactment of school-zone gun bans." Baker at 1913.

> President Clinton's understanding of current Spending Clause doctrine is plainly correct. In 1987, the Court held in *South Dakota v. Dole* that the Spending Clause authorizes Congress to make even those conditional offers of funds to the states which, if accepted, regulate the states in ways that it could not directly mandate. Thus, with *Dole*, the Court offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states.

Id. at 1914.

Professor Baker's analysis is telling. With the Court's revitalization of states' rights, it is ironic that this Court has not addressed the greatest threat to federalism--the scope of the spending power. This Court should address the issue now.

CONCLUSION

If the federalist structure of our government is to mean anything, this Court must set some workable limits on Congress' power to co-opt the states through the spending power. Therefore, this Court should grant the writ of certiorari.

DATED: December, 1999.

Respectfully submitted,

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No. 99-596

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In The

Supreme Court of the United States

GEORGE MASON UNIVERSITY,

Petitioner,

v.

UNITED STATES OF AMERICA and
ANNETTE GRECO LITMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT ANNETTE GRECO LITMAN IN OPPOSITION

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QUESTION PRESENTED

Whether Congress could constitutionally require the States to waive their Eleventh Amendment immunity under Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.*, when they apply for and voluntarily accept federal funds for education programs or activities, as did Petitioner George Mason University here.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. STATEMENT OF FACTS 1

B. THE PROCEEDINGS BELOW 6

ARGUMENT 7

I. PETITIONER IS FORECLOSED FROM RAISING A NEW ISSUE IN ITS PETITION 7

II. THE FOURTH CIRCUIT'S DECISION IS CORRECT 11

III. THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEALS 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 119 S. Ct. 2240 (1999) 11, 12, 13

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 12

Bradley v. Arkansas Dept. of Education, 189 F.3d 745 (8th Cir. 1999) 21, 22

Cannon v. University of Chicago, 441 U.S. 677 (1979) 8, 13, 14, 22

Clark v. California, 123 F.3d 1267 (9th Cir. 1997), *cert. denied sub nom.* Wilson v. Armstrong, 524 U.S. 937 (1998) 14, 21

College Savings Bank v. Florida Prepaid Post-secondary Education Expenses Bd., 119 S. Ct. 2219 (1999) 11, 19

Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997) 14, 21, 22

Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661 (1999) 11, 15, 16

Doe v. University of Illinois, 138 F.3d 653 (7th Cir. 1998), vacated and remanded on other grounds, 119 S. Ct. 2016 (1999), on remand, 1999 U.S. App. LEXIS 28406 (Oct. 29, 1999) 20

E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19 (1986) 9, 11

Edelman v. Jordan, 415 U.S. 657 (1974) 11

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 19

Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank, 119 S. Ct. 2199 (1999) 19

TABLE OF AUTHORITIES – Continued

Page

Ford Motor Co. v. Department of the Treasury, 323 U.S. 459 (1945) 10

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) 8, 12

Franks v. Kentucky School for the Deaf, 142 F.3d 360 (6th Cir. 1998) 20

Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274 (1998) ..... *passim*

Green v. Mansour, 474 U.S. 64 (1985) 12

Guardian Ass'n v. Civil Serv. Comm'n of New York City, 463 U.S. 582 (1983) 15

Lane v. Peña, 518 U.S. 187 (1996) 8, 12

Lesage v. Texas, 158 F.3d 213 (5th Cir. 1998), *cert. granted, reversed, and remanded on other grounds,* 1999 U.S. LEXIS 8014 (Nov. 29, 1999) 21

Massachusetts v. Mellon, 262 U.S. 447 (1923) 12, 13

Mississippi University For Women v. Hogan, 458 U.S. 718 (1982) 14

New York v. United States, 505 U.S. 144 (1992) 11

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 15

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 9

Sandoval v. Hagan, 1999 U.S. App. LEXIS 30722 (11th Cir. 1999) 21

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 12, 19, 21

South Dakota v. Dole, 483 U.S. 203 (1987) 11, 13

TABLE OF AUTHORITIES – Continued

Page

Timmer v. Michigan Dept. of Commerce, 104 F.3d 833 (6th Cir. 1997) 21

United States v. Virginia, 518 U.S. 534 (1996) ... 14, 15, 17

Varner v. Illinois State University, 150 F.3d 706 (7th Cir. 1998) 21

CONSTITUTION AND STATUTES:

United States Const.
Art. I, §8, Cl. 1 (Spending Clause) ..... *passim*

Art. IX ..... *passim*

Art. XIV, §5 ("Equal Protection Clause") 7, 9, 20

Age Discrimination in Employment Act of 1975, 29 U.S.C. §621 *et seq.* 8

Civil Rights Act of 1964, Title VI, 42 U.S.C. §2000d-7 ..... 6, 8, 11, 12, 21

Civil Rights Remedies Equalization Act, 42 U.S.C. §2000d-7(a)(1) 8, 15, 18

Education Amendments of 1972, Title IX, 20 U.S.C. §§1681 *et seq.* ..... *passim*

Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* 13

Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1487 ..... 21, 22

Rehabilitation Act of 1973, 29 U.S.C. §794 ..... 8, 21

42 U.S.C. §1983 6

MISCELLANEOUS:

31 Cong. Rec. 22,344-22,345 (1985) 8

Department of Education regulations, 34 C.F.R. §106.4(a) 18

STATEMENT OF THE CASE

In its decision, reported at 185 F.3d 544, the United States Court of Appeals for the Fourth Circuit held, consistent with other courts of appeals which have dealt with the *same* issue, that Petitioner George Mason University (GMU) knowingly and voluntarily waived its sovereign immunity against suits under Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.*, by applying for and accepting federal education funds. App. 1-26.[1] The Court of Appeals affirmed a decision by the United States District Court for the Eastern District of Virginia, 5 F.Supp. 2d 366, which was issued on May 7, 1998, and which denied in pertinent part GMU's motion to dismiss Respondent Annette Greco Litman's Title IX claims against it. App. 27-55.

A. STATEMENT OF FACTS

The following facts are alleged in Respondent Litman's complaint:

Petitioner GMU is a public institution of the Commonwealth of Virginia. It offers education programs and receives federal financial assistance within the meaning of Title IX, 20 U.S.C. §1681(a). App. 3.

During the 1995-1996 school year, Respondent Annette Litman was a student taking electrical engineering program courses at GMU. During the Summer 1995

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[1] "App." references are to the Appendix to Petitioner's Petition. "J.A." references are to the Joint Appendix to the parties' briefs to the Fourth Circuit.

semester, Ms. Litman took a computer science class taught by Defendant Eugene Norris, an Associate Professor in GMU's Computer Science Department. Before the Fall 1995 semester, Dr. Norris offered Ms. Litman a job as a research assistant on a research project under him, and she accepted it. Dr. Norris also persuaded her to sign up for his Fall 1995 computer science class. App. 2, 3.

Dr. Norris sexually harassed Ms. Litman. He stalked her; he made increasingly intense gestures of love towards her; he inquired repeatedly about her sexual activities with her husband; he subjected her to discourses on sex and love during weekly status report meetings; he telephoned her at home; he invited her to lunch; he touched her intimately on her hands; he gave her personal gifts; and he inappropriately accessed her confidential student records on the GMU computer system. App. 3-4, 28.

Beginning in the fall of 1995, Ms. Litman reported Dr. Norris's unwelcome behavior to other GMU faculty and administrators. Between October 1995 and February 1996, and contrary to petitioner's assertions (Petition at 5), she informed Dr. Geoffrey Orsak, of the Electrical and Computer Engineering (ECE) Department, about Dr. Norris's sexual harassment of her. App. 28. Although Dr. Orsak informed Dr. Gerald Cook, Chair of the ECE Department, about it, no action was taken, and Dr. Norris continued to harass Ms. Litman sexually. J.A. 166-167; 14-17. On January 23, 1996,[2] Ms. Litman terminated her assistantship

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[2] Unless otherwise indicated, all dates hereafter refer to 1996.

with Dr. Norris. In February she reported Dr. Norris's sexual harassment directly to Dr. Cook. Still Dr. Cook took no action against Dr. Norris. J.A. 17.

Dr. Norris's sexual harassment caused Ms. Litman considerable emotional distress. App. 28. Suffering from insomnia, anxiety, and depression, she entered counseling at the GMU student development center. App. 29. She terminated her working relationships with other professors and ceased contact with faculty. App. 4, 28-29; J.A. 15-18.

The following weekend, Dr. Norris stalked Ms. Litman outside one of her classes and told her that he had "[his] ways of finding [her]." Ms. Litman informed Dr. Norris that she had begun counseling and was avoiding contact with faculty. Dr. Norris asked her if "faculty" included him, persisted in trying to talk to her about their relationship, and then followed her when she walked away from him. App. 29; J.A. 17-18.

Later Ms. Litman went to the GMU police department for help, but received none. On February 13, Dr. Norris sent her a Valentine's Day e-mail. App. 28; J.A. 17-18. Ms. Litman complained again to Dr. Cook and demanded he take action. Dr. Cook refused, but did inform her that she should take her sexual harassment complaint to GMU's Equity Office. J.A. 18. On February 15, Ms. Litman complained to GMU's Equity Office about Dr. Norris's sexual harassment. The Equity Office asked Dr. Norris to avoid contact with Ms. Litman, but it refused to process her complaint, in violation of GMU's sexual harassment policy. App. 4, 29; J.A. 18-19.

In early April, Ms. Litman was rejected by professors she approached to advise her senior project. Some faculty would not speak to her. App. 4, 29; J.A. 19-20. On April 12, in Dr. Cook's presence, Ms. Litman asked Dr. Orsak not to spread damaging gossip about her sexual harassment experiences if he were doing so. In response, Dr. Orsak asked Ms. Litman to drop out of his class. Ms. Litman refused. Dr. Orsak informed Ms. Litman that he and Dr. Cook would decide if she would be removed from his class. Five days later, Ms. Litman discovered that Dr. Orsak had complained to the GMU Equity Office that *she* was sexually harassing *him* and that he was attempting to have her removed from her classes. App. 4, 29; J.A. 20-21.

Ms. Litman sent Dr. Orsak and another professor e-mail which protested GMU's retaliation against her for complaining about Dr. Norris's sexual harassment, expressed her increasingly severe emotional distress, and sought reconciliation which would enable her to continue her academic activities. App. 4, 29; J.A. 20-22. The professors did not respond with help for her. Ms. Litman reported the conflict to the GMU President's office, explaining that Dr. Orsak was making false complaints about her and that the Equity Office was not acting on her sexual harassment complaint against Dr. Norris. See App. 29; J.A. 21.

On April 30, because GMU's Equity Office still refused to help her, Ms. Litman began circulating a petition to urge GMU to investigate her sexual harassment complaint against Dr. Norris, and on May 3 she filed a formal complaint with the Equity Office. See App. 29; J.A. 21-22. At the same time, suffering from severe anxiety

attacks and suicidal ideation, Ms. Litman sought emergency room care and was prescribed sedatives, pending a full psychiatric evaluation. See J.A. 24.

Later, although they knew that she was in counseling for emotional distress, Dr. Orsak and another professor brought disciplinary charges against her under the Student Judicial Code. In May, Defendant Girard Mulherin, Associate Dean of Student Services and GMU's Judicial Administrator, charged Ms. Litman with allegedly "disrupting the learning/teaching environment" by harassing Dr. Orsak, predominantly through her e-mail. See App. 4, 29. See App. 29; J.A. 23-24. The disciplinary proceeding was held before the University Judicial Board (UJB) on May 30. App. 4, 29. The hearing was rife with procedural and due process irregularities. J.A. 24. Ms. Litman, who was sedated with Valium, asked for a postponement and an advocate since she was unable to defend herself because of her mental illness and medication for it. However, GMU rejected her request for these accommodations, and required her to defend herself then. App. 29. Although there was no evidence she had actually disrupted the learning or teaching environment, the UJB recommended her expulsion. App. 4, 30; J.A. 24-27. In his capacity as Judicial Administrator, Dr. Mulherin then found Ms. Litman guilty and expelled her permanently, imposed academic sanctions against her, and barred her from all GMU campuses and from speaking to anyone at GMU. App. 4; 30; 26-29.

After Ms. Litman was expelled, GMU's Equity Office finally proceeded with the sexual harassment charges that she had filed against Dr. Norris many months earlier. On October 17, it held a hearing on those charges. App. 4,

30. The evidence against him was overwhelming, and he admitted most of the acts alleged in her complaint. However, GMU merely found that Dr. Norris had failed to live up to its "standards" and that he did not "violate" GMU's sexual harassment policy, and it did not discipline him at all or provide any relief for Respondent Litman. App. 4, 30; J.A. 30.

B. THE PROCEEDINGS BELOW

On October 31, 1997, Respondent Litman filed her Complaint against GMU, Dr. Norris, Dr. Orsak, and Dean Mulherin under Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.*, 42 U.S.C. §1983, and state law. She claimed gender discrimination in violation of Title IX (against GMU) (Count I); retaliation in violation of Title IX (against GMU) (Count II); deprivation of free speech rights under color of law (against Dr. Orsak, Dean Mulherin and GMU) (Count III); deprivation of due process under color of law (against GMU, Dr. Orsak, and Dean Mulherin) (Count IV); deprivation of Equal Protection Rights under color of law (against Dr. Norris, Dr. Orsak, Dean Mulherin, and GMU) (Count V); and intentional infliction of emotional distress (against Dr. Norris) (Count VI). J.A. 168-169; 31-37.

The district court denied motions to dismiss Counts I and II against GMU and Counts V and VI against Dr. Norris. In denying Petitioner GMU's motion to dismiss Respondent Litman's Title IX claims, the district court held that by accepting federal funds after enactment of 42 U.S.C. §2000d-7, GMU consented to the waiver of its Eleventh Amendment immunity (App. 49-50). The Court

of Appeals affirmed on that basis, upholding the constitutionality of Title IX under the Spending Clause of Article I. The appeals court did not reach the issue whether the law was also constitutional under Section 5 of the Fourteenth Amendment (the "Equal Protection Clause"), as Ms. Litman and the United States had argued in the alternative.

ARGUMENT

The Court should not consider the issue presented by petitioner in its petition – whether "Congress may require States to waive its sovereign immunity as a condition of receiving federal funds" (Petition at i) – because petitioner did not present it to the courts below. In any event, it is well settled under the Court's decisions that, in enacting legislation under the Spending Clause of Article I, Congress may constitutionally condition a State's acceptance of federal funds on its waiver of Eleventh Amendment immunity from suits under that particular legislation. The decision of the Court of Appeals below is in accord with those decisions and does not conflict with those of other circuits which have ruled on the constitutionality of Title IX as applied to suits against States.

I. PETITIONER IS FORECLOSED FROM RAISING A NEW ISSUE IN ITS PETITION

Title IX prohibits sex discrimination in federally-funded education. In relevant part, Title IX, 20 U.S.C. §1681(a), provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, . . .

Under Title IX, students and school employees may bring a private cause of action for sexual harassment against entities which receive Federal funds for education. *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 288-89 (1998); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 63-65, 76 (1992); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

In 1986 Congress enacted the Civil Rights Remedies Equalization Act [CRREA], 42 U.S.C. §2000d-7(a)(1), to make it clearer that States would not be immune from suits under statutes such as Title IX. See *Lane v. Peña*, 518 U.S. 187, 200 (1996); 31 Cong. Rec. 22,344-22,345 (1985). The CRREA provides, in relevant part:

> A State shall not be immune from suit under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of * * * title IX of the Education Amendments of 1972 [20 U.S.C. Section 1681 *et seq.*] * * * or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

As the Court explained in *Franklin*, 503 U.S. at 72, "In the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975."

Petitioner attacks Title IX and Ms. Litman's complaint on the ground that Title IX was an unconstitutional abrogation of the Commonwealth's immunity under the Eleventh Amendment, in the view that Congress may not use Article I's Spending Clause to require a State to waive its sovereign immunity against a private party suit as a condition for receiving funds from the Federal Government, because such a requirement is unduly coercive. Petition at 10-12, 15, 23-25.

This is an argument which petitioner did not raise below. Petitioner acknowledges that it "did not use the language of coercion in its briefs before the District Court and Fourth Circuit." Petition at 15 n. 13.[3] As the Fourth Circuit pointed out (App. 16), petitioner did not argue below "that the attachment of conditions to the funding arrangement is coercive." Rather, petitioner argued, more narrowly, simply that for a State to waive its Eleventh Amendment immunity, Congress must specifically impose such a waiver by explicit language in the statute at issue. App. Br. 19-20; see also App. 12, 16-17. Also, in its brief to the Fourth Circuit (App. Br. 6, 7), GMU specifically acknowledged that immunity may be abrogated by Congress under Section 5 of the Fourteenth Amendment and that "a State, by its choice, may waive its Eleventh Amendment immunity." Because petitioner did not present this contention to the Fourth Circuit, the Court should reject the petition for this reason alone. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989); *E.E.O.C. v.*

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[3] Contrary to petitioner (Petition at 15 n. 13), this is not merely "different rhetoric," but is an entirely separate and broader argument.

Federal Labor Relations Authority, 476 U.S. 19, 24 (1986). Accordingly, this should end the Court's review of GMU's petition.

Petitioner argues that it should be permitted to raise this issue because "arguments regarding sovereign immunity can be raised at any stage of the proceeding." Petition at 15 n. 13, citing *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 467 (1945). However, that case is distinguishable because its central issue was not whether a federal statute abrogated sovereign immunity, but whether a federal court had jurisdiction over an action by private parties against a State and state officials, where the State had initially defended the suit on the merits (and prevailed) and had thus waived sovereign immunity by such a defense.[4] In *Ford*, the petitioner argued for the first time in this Court that the Eleventh Amendment sets forth an explicit limitation on federal judicial power which required the issue before the Court first be decided by the state courts. The case required an initial interpretation of state law – specifically whether state executive or administrative officials could consent to suit against the state. *Id.* at 467-470. The Court held that by its actions in that case, the state official had not waived sovereign immunity by defending the merits in a particular case and that a waiver required a "general consent to suit in all similar causes of action." *Id.* at 468. Moreover, here the petitioner *did* raise the general issue in its pleadings and brief below, but affirmatively chose not to make the broad contention it now presents to the

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[4] An Indiana statute provided that such action could be brought in state court against the state. *Id.* at 465-466.

Court. Therefore, it has already had, and squandered, the opportunity to present that argument.

II. THE FOURTH CIRCUIT'S DECISION IS CORRECT

If the Court reaches the "merits" of petitioner's arguments, it should reject them. Thus, it is frivolous for petitioner to argue that it is unconstitutional for the Federal Government to require a waiver of immunity as a condition of participation in federally funded programs (Petition at 18-19). It has long been established, and the Court recently reaffirmed, that Congress may constitutionally condition States' participation in federally funded programs upon a waiver of their immunity from suits by private parties. See *College Savings Bank v. Florida Prepaid Postsecondary Education Expenses Bd.*, 119 S. Ct. 2219, 2223, 2231 (1999); *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999); *New York v. United States*, 505 U.S. 144, 171-73 (1992); *South Dakota v. Dole*, 483 U.S. 203, 210 (1987); *Edelman v. Jordan*, 415 U.S. 657, 672 (1974). See also *Gebser*, 524 U.S. at 288, 2267, 118 S. Ct. at 1996, 1999, where the Court referred to "Congress' abrogation of the States' Eleventh Amendment immunity under Title IX, see 42 U.S.C. §2000d-7," without expressing any reservation about whether the abrogation was constitutional. Similarly, in *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1669-20 (1999), the Court seemed to assume that under its Spending Clause powers, Congress could provide for private causes of actions for damages against States receiving federal funds, at least where there was notice to the recipients that they could be liable for the conduct at issue in such suits. Accordingly, if the Court

does not reject the petition because petitioner failed to present this issue below, it should deny the petition because the law is clear that, by accepting federal funds, GMU waived any immunity from a Title IX suit, as the District Court and Circuit Court properly held (App. 21, 26, 49-50).

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court established a two-prong test for determining whether a federal statute has constitutionally abrogated the States' Eleventh Amendment immunity: "[F]irst whether Congress has unequivocally expresse[d] its intent to abrogate the immunity'; . . . and, second, whether Congress has acted 'pursuant to a valid exercise of power.' " *Id.* at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). It is settled that "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). When these principles are applied here, as the courts below did properly, petitioner's arguments should be rejected.

First, as Respondent has admitted (App. Br. 8; see also App. 16-17), the Court has held that in Section 2000d-7, Congress unambiguously expressed its intent to remove States' Eleventh Amendment immunity from private suits in federal court. *Lane v. Peña*, 518 U.S. at 198; *Franklin*, 503 U.S. at 72. The waiver condition does not unduly restrict such States' immunity under the Eleventh Amendment, since they may choose to accept the condition imposed by the statute or forego the federal funds authorized by that legislation. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 238; *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923). Cf. also *Alden v. Maine*, 119 S. Ct. 220,

2246, 2254, 2261, 2263, 2264, 2266, 2267, 2268 (1999), where the Court, through its repeated references to "non-consenting States," took pains to distinguish the statute there (the Fair Labor Standards Act) from other statutes, such as Title IX here, in which Congress has reasonably conditioned a State's acceptance of federal funds on its waiver of its sovereign immunity against private causes of action in federal court to enforce such statutes. As the Court held in *Massachusetts v. Mellon*, 262 U.S. at 480, "[T]he powers of the state are not invaded since the statute imposes no obligation [to accept the funds] but simply extends an option which the state is free to accept or reject." Under *Dole*, 483 U.S. at 207, such waivers of immunity are deemed valid when Congress has exercised its power in pursuit of "the general welfare"; when it has clearly and unambiguously expressed its desire to condition acceptance of the funds on compliance with the statute; and when the condition is related to a federal interest in a particular project or program.

Here, all of those conditions are readily met. First, as the Court held in *Gebser*, "Congress enacted Title IX in 1972 with two principal objectives in mind: 'to avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective protection against those practices.' " 524 U.S. at 289, citing *Cannon*, at 704.[5] Petitioner does not deny that by prohibiting

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[5] The text in *Cannon* to which the Court in *Gebser* referred was the following statement (441 U.S. at 704): "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."

sex discrimination in federally funded educational programs, Title IX clearly provides for the "general welfare." See App. 16, 46.

Second, Title IX obviously conditions the receipt of Federal financial assistance by any education program, including State programs, on its compliance with the statute's prohibition against sex discrimination. See also App. Br. 19. In *Lane*, 518 U.S. at 198, the Court held the abrogation was unambiguous. See also *Clark v. California*, 123 F.3d 1267, 1270 (9th Cir. 1997), *cert. denied sub nom. Wilson v. Armstrong*, 524 U.S. 937 (1998).

Third, the condition is directly related to the federal interest in prohibiting sex discrimination in educational programs receiving federal funds. It has long been held that the Fourteenth Amendment proscribes gender discrimination, including such discrimination in public education. See *United States v. Virginia*, 518 U.S. 534 (1996); *Cannon*, 441 U.S. at 708 ("Since the Civil War, the Federal Government and the federal courts have been ' "the primary and powerful reliances" ' in protecting citizens" "against invidious discrimination of any sort, including that on the basis of sex."); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). To that end, "Title IX focuses . . . on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Gebser*, 118 S. Ct. at 1997, citing *Cannon, supra*, at 704. As the Eighth Circuit held in *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997),

> Because the Supreme Court has repeatedly held that those substantive provisions [of the Fourteenth Amendment] proscribe gender discrimination in education, see, *e.g.*, *United States v.*

> *Virginia*, [518] U.S. [534], 116 S. Ct. 2264, 135 L.Ed. 2d 735 (1996), we are unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by §5.

In the instant case, it is undisputed that at all relevant times, since well before Ms. Litman's claims arose, petitioner has received federal funds and "thus, is subject to Title IX." App. Br. 4. Under the authorities cited above (pp. 12-14), since GMU accepted federal funds after Section 2000d-7(a)(1) became effective, it waived any Eleventh Amendment immunity against federal suits over alleged Title IX violations. As the Court explained in *Gebser*, by "conditioning an offer of federal funding on a promise by the recipient not to discriminate," Title IX, like Title VI, "amounts essentially to a contract between the Government and the recipient of funds." 524 U.S. at 290, 118 S. Ct. at 1997, citing *Guardian Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 599 (1983). See also *Davis*, 119 S. Ct. at 1669-20; *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

In sum, the appellate court properly held (App. 21) that "Congress, in enacting 42 U.S.C. §2000d-7(a)(1), permissibly conditioned GMU's receipt of Title IX funds on an unambiguous waiver of GMU's Eleventh Amendment immunity, and that, in accepting such funding, GMU has consented to litigate Litman's suit in federal court."

Petitioner asks the Court "to determine whether Congress may use the Spending Clause 'to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy

in the most sensitive area of traditional state concern, areas which otherwise would lie outside its reach.' " Petition at 4, quoting *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1677 (1999) (Kennedy, J., joined by Rehnquist, C.J., Scalia, and Thomas, JJ., dissenting). However, as explained above, the Court has long held that Congress may enact legislation which abrogates, or requires waiver of, the States' sovereign immunity under either the Spending Clause or the Equal Protection Clause. To the extent that petitioner's request suggests that the above-quoted dissenting opinion challenged the application of Title IX to the States under the Spending Clause, petitioner of course misrepresents that opinion. Petitioner quotes it out of context, by not including the phrase by Justice Kennedy which immediately preceded it: Congressional Spending Clause power, "*if* wielded without concern for the federal balance, has the *potential* to obliterate distinctions. . . . " 119 S. Ct. at 1677 (emphasis added). Further, the focus of the *Davis* dissent was on the issue of how much notice needs to be provided to States about the conditions attached to the federal funds, and specifically whether States are on notice that, through Title IX, Congress wanted to prohibit sexual harassment not only by teachers on students, but also by students towards other students. In addition, petitioner fails to mention that the dissenters in *Davis* acknowledged that "[t]eacher sexual harassment of students" would be an action by an agent of the State which it would know was prohibited by Title IX. *Id.* at 1679. The Title IX claims here of course concern the classic teacher-on-student sexual harassment, which the *Davis* dissenters would hold was

reasonably foreseeable to a State as giving rise to a Title IX action.

Moreover, it is absurd to suggest there is some special "traditional state concern" *in favor of* gender discrimination by state educational institutions! As the Court pointed out in *United States v. Virginia*, 518 U.S. at 531, "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." Petitioner does not begin to demonstrate why there is a constitutional basis for finding that Virginia should have a policy permitting sexual harassment of students by college faculty.

Petitioner argues that it is coercive for Congress to require a State to "waive its sovereign immunity for all claims arising under Title IX if it receives *any* federal funding, even federal funding unrelated to the State's obligations to comply with Title IX." Petition at 15. The argument is frivolous. States should already know that, under the Constitution and Title IX, they must not discriminate on the basis of gender in their educational activities. Moreover, States do not have to apply for federal funds, and when they do, they understand that Title IX conditions receipt on their agreeing not to discriminate on the basis of gender and their waiving sovereign immunity against suits in federal court by private parties. As the Fourth Circuit aptly explained below (App. 17):

> GMU acknowledges that it voluntarily accepts Title IX funding. Indeed, it must apply for federal funds. And in connection with any application, it must assure the Federal Government of its intent to comply with 20 U.S.C. §1681(a). Implementing regulations provide that

> each recipient of Title IX funding must enter into a contract of assurance with the Department of Education and thereby manifest its intent to adhere to the conditions imposed by Title IX. *See* 34 C.F.R. §106.4(a). . . . Thus, in voluntarily accepting federal education funds, GMU is unequivocally put on notice of three conditions: (1) that it may not discriminate in its programs on the basis of sex, *see* 20 U.S.C. §1681(a); (2) that if it does discriminate on the basis of sex, it may be sued by a private individual, *see Gebser*, 118 S. Ct. at 1996, 1999; and (3) that in any such suit, it may not assert its Eleventh Amendment immunity, *see* 42 U.S.C. §2000d-7(a)(1). There can be no doubt that GMU is able "to ascertain what is expected of it" in return for federal education funds.

The above-quoted Education Department regulations, 34 C.F.R. §106.4(a), provide:

> Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

By its terms, the implementing regulations thus apply to any "education program or activity" for which the applicant or recipient receives federal funds. Accordingly, and contrary to petitioner, the statutory and regulatory restrictions of Title IX cover just the education program or activity for which the Federal Government has provided funds and it is not so broad as to cover *all* activities

for which the State receives federal funding. See *Gebser*, 524 U.S. at 289. Therefore, Title IX provides for the free formation of a contract whereby the recipient, whether it is a private entity or a State, promises not to discriminate in educational activities on the basis of gender, in return for the receipt of federal funds for education programs. This is hardly coercive!

Petitioner urges the Court to roll back the calendar three score years, to overrule its decisions in *Dole* and many other cases, and to "return to the general principles of [*United States v. Butler*, 297 U.S. 1 (1936)]." Petition at 17 n. 14. See also Petition at 17-20. In *Seminole Tribe*, the Court reaffirmed the basic principles underlying the abrogation of sovereign immunity, for it held, "[W]e recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the constitution." 517 U.S. at 59, citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976). More recently, in the trilogy of sovereign immunity cases decided on June 23, 1999 – *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999); *College Savings Bank*; and *Alden*, the Court had the opportunity to adopt this anti-federalist approach, but chose instead to affirm that Congress may constitutionally abrogate States' sovereign immunity by requiring them, as a condition for voluntary receipt of federal funds, to consent in advance to waiving their immunity from suits by private individuals in federal courts. See *College Savings Bank*, 119 S. Ct. at 2226, 2231; *Alden*, 119 S. Ct. at 2267; *Florida Prepaid Postsecondary Educ. Bd.*, 119 S. Ct. at 2205.

Without any constitutional or statutory authority, petitioner compares the condition of requiring States to waive their sovereign immunity from private suits as a condition for receipt of federal funds to "a requirement that an individual surrender a vital organ, such as a kidney, as a condition of receiving some public benefit." Petition at 20 n. 15. The comparison is ludicrous! Neither Congress nor the Education Department requires any sacrifice of anything equivalent to "vital organs" by States in return for federal funds. The States have the choice of applying for the funds, and do not have to do so if they do not want the funds. If they do receive such funds, the States must merely consent to waiver of sovereign immunity from private causes of action in federal court, where the plaintiffs must of course prove their claims as a matter of law and fact.

III. THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEALS

Furthermore, contrary to petitioner, there is no conflict in the circuits. The other courts of appeals which have ruled on the issue have also upheld the constitutionality of Title IX as applied to State educational programs, under Section 5 of the Fourteenth Amendment. See *Franks v. Kentucky School for the Deaf*, 142 F.3d 360, 362-63 (6th Cir. 1998); *Doe v. University of Illinois*, 138 F.3d 653, 663-667 (7th Cir. 1998), *vacated and remanded on other grounds*, 119 S. Ct. 2016 (1999), *on remand*, 1999 U.S. App. LEXIS 28406 (Oct. 29, 1999) (affirming decision to reject

State's claim of Eleventh Amendment immunity); No. 98-126; *Crawford*, 109 F.3d at 1283.[6]

Petitioner cites *Bradley v. Arkansas Dept. of Education*, 189 F.3d 745 (8th Cir., 1999), for the proposition that "the Eighth Circuit held that §2000d-7 is *unconstitutional* to the extent that it requires a State to waive its sovereign immunity as a condition of receiving federal funds" (Petition at 10; emphasis by petitioner). However, *Bradley* did not involve Title IX, but rather the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1487, and Section 504 of the Rehabilitation Act [RA], 29 U.S.C. §794. In *Bradley*, the court held that Section 504 of the RA fails the second prong of the test in *Seminole Tribe*, 517 U.S. at 55, since it is so broad that it "mandates" that a State "waive its Eleventh Amendment immunity to all claims arising under §504 if it receives any federal funding, even funding unrelated to the state's obligations to comply with §504 or the rest of the RA." 189 F.3d at 757. Therefore, the Eighth Circuit concluded, "Congress's imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion." *Id.*

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[6] Dismissing similar sovereign immunity challenges, the courts of appeals have upheld the constitutionality of other civil rights statutes. See, *e.g.*, *Sandoval v. Hagan*, 1999 U.S. App. LEXIS 30722, *18-28 (11th Cir. 1999) (Title VI); *Lesage v. Texas*, 158 F.3d 213 (5th Cir. 1998) (same), *cert. granted, reversed, and remanded on other grounds*, 1999 U.S. LEXIS 8014 (Nov. 29, 1999); *Varner v. Illinois State University*, 150 F.3d 706, 709-17 (7th Cir., 1998) (Equal Pay Act); *Timmer v. Michigan Dept. of Commerce*, 104 F.3d 833, 838-39 (6th Cir. 1997) (same); *Clark v. California*, 123 F.3d at 1270 (ADA and Section 504 of the Rehabilitation Act).

By contrast, as explained above, Title IX simply and more narrowly prohibits sex discrimination "under any education program or activity receiving Federal financial assistance. . . . " 20 U.S.C. §1681(a). Title IX is thus distinguishable from statutes, such as Title VII and the RA, "which [are] framed in terms not of a condition but of an outright prohibition," and "whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Gebser*, 118 S. Ct. at 1997, citing *Cannon, supra*, at 704. Further, Title IX is much more akin to the IDEA, which the court of appeals in *Bradley did* uphold as constitutional with respect to State programs. Like the Title IX waiver, States knowingly "waive their Eleventh Amendment immunity with respect to IDEA claims when [they] chose to participate in the federal spending program created by the IDEA." 189 F.3d at 753. As the Eighth Circuit explained,

> When it enacted §§1403 and 1415, Congress provided a clear, unambiguous warning of its intent to condition a state's participation in the IDEA program and its receipt of federal IDEA funds on the state's waiver of its immunity from suit in federal court on claims made under the IDEA. *Id.*

Finally, the fact that *Bradley* has no adverse impact on Title IX suits against States is reinforced by the fact that in it, the Eighth Circuit did not feel obliged even to mention, let alone distinguish, its decision in *Crawford*, in which it held that Congress constitutionally abrogated

the States' Eleventh Amendment of immunity from Title IX claims. See above.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[7] Furthermore, it is possible that the Eighth Circuit may reverse its own decision since on October 14, 1999, the United States petitioned it for rehearing and rehearing en banc.

Supreme Court, U.S.
FILED
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No. 99-596

In the Supreme Court of the United States

GEORGE MASON UNIVERSITY, PETITIONER

v.

ANNETTE GRECO LITMAN AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, which is a state university that receives federal financial assistance, is subject to suit for sex discrimination, either because petitioner waived its Eleventh Amendment immunity when it applied for and accepted the federal financial assistance or because Congress has validly abrogated petitioner's immunity from such suits under Section 5 of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 119 S. Ct. 2240 (1999)	6, 8, 9
Amos v. *Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212 (1999), vacated for rehearing en banc, No. 96-7091 (4th Cir. Dec. 28, 1999)	7
Andrews v. *City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990)	18
Association of Mexican-American Educators v. *California*, 195 F.3d 465 (9th Cir. 1999)	13
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985)	3
Bankers Life & Cas. Co. v. *Crenshaw*, 486 U.S. 71 (1988)	11
Bator v. *Hawaii*, 39 F.3d 1021 (9th Cir. 1994)	18
Beardsley v. *Webb*, 30 F.3d 524 (4th Cir. 1994)	18
Bell v. *New Jersey*, 461 U.S. 773 (1983)	9
Blessing v. *Freestone*, 520 U.S. 329 (1997)	12
Board of Educ. v. *Mergens*, 496 U.S. 226 (1990)	16
Bohen v. *City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986)	18
Bradley v. *Arkansas Dep't of Educ.*, 189 F.3d 745 (8th Cir. 1999)	10, 13, 14
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	2
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	18
Clark v. *Barnard*, 108 U.S. 436 (1883)	7

Cases—Continued: Page

Clark v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998) 7, 10
College Sav. Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999) 7, 8, 9, 17, 18
Crawford v. *Davis*, 109 F.3d 1281 (8th Cir. 1997) 17
Cross v. *Alabama*, 49 F.3d 1490 (11th Cir. 1995) 18
Delaware Dep't of Health & Soc. Servs. v. *Department of Educ.*, 772 F.2d 1123 (3d Cir. 1985) 10
Department of Educ. v. *Katherine D.*, 727 F.2d 809 (9th Cir. 1983), cert. denied, 471 U.S. 1117 (1985) 10
Doe v. *University of Ill.*, 138 F.3d 653 (7th Cir. 1998), vacated and remanded, 119 S. Ct. 2016 (1999), reinstated in pertinent part, No. 96-3511, 1999 WL 1257383 (7th Cir. Dec. 23, 1999) 17
FW/PBS, Inc. v. *City of Dallas*, 493 U.S. 215 (1990) 11
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976) 17
Florida Nursing Home Ass'n v. *Page*, 616 F.2d 1355 (5th Cir. 1980), rev'd due to the absence of a clear statement *sub nom. Florida Dep't of Health & Rehabilitation Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) 10
Franklin v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) 2
Franks v. *Kentucky Schs. for the Deaf*, 142 F.3d 360 (6th Cir. 1998) 17
Gebser v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) 2
Gierlinger v. *New York State Police*, 15 F.3d 32 (2d Cir. 1994) 18
Green v. *Mansour*, 474 U.S. 64 (1985) 7
Grove City College v. *Bell*, 465 U.S. 555 (1984) 2, 15, 16
Headley v. *Bacon*, 828 F.2d 1272 (8th Cir. 1987) 18
Innes, In re, 184 F.3d 1275 (10th Cir. 1999) 7
J.E.B. v. *Alabama*, 511 U.S. 127 (1994) 17, 18

Cases—Continued: Page

Jim C. v. *Arkansas Dep't of Educ*, No. 98-1830EALR, 1999 WL 1209784 (8th Cir. Dec. 14, 1999) 13
Johnson v. *Martin*, 195 F.3d 1208 (10th Cir. 1999) 18
Klinger v. *Department of Corrections*, 107 F.3d 609 (8th Cir. 1997) 14
Lau v. *Nichols*, 414 U.S. 563 (1974) 15, 16
Lesage v. *Texas*, 158 F.3d 213 (5th Cir. 1998), rev'd and remanded on other grounds, 120 S. Ct. 467 (1999) 17
Lightbourn v. *County of El Paso*, 118 F.3d 421 (5th Cir. 1997), cert. denied, 522 U.S. 1052 (1998) 14
Little Rock Sch. Dist. v. *Mauney*, 183 F.3d 816 (8th Cir. 1999) 7, 10
Metropolitan Wash. Airports Auth. v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) 9
Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 12
Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982) 18
Nelson v. *Miller*, 170 F.3d 641 (6th Cir. 1999) 13
New York v. *United States*, 505 U.S. 144 (1992) 8, 9
O'Connor v. *Davis*, 126 F.3d 112 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998) 13-14
Oklahoma Tax Comm'n v. *Chickasaw Nation*, 515 U.S. 450 (1995) 11
Oklahoma v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) 8
Petty v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) 8-9
Poe v. *Hayden*, 853 F.2d 418 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989) 18
Pontarelli v. *Stone*, 930 F.2d 104 (1st Cir. 1991) 18
Premo v. *Martin*, 119 F.3d 764 (9th Cir. 1997), cert. denied, 522 U.S. 1147 (1998) 10

Cases—Continued: Page

Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 5
Rust v. *Sullivan*, 500 U.S. 173 (1991) 15
Salinas v. *United States*, 522 U.S. 52 (1997) 15
Sandoval v. *Hagan*, 197 F.3d 484 (11th Cir. 1999) 7, 10
Scanlon v. *Atascadero State Hosp.*, 735 F.2d 359 (9th Cir.), rev'd due to the absence of a clear statement, 469 U.S. 1032 (1984) 10
Schroeder v. *City of Chicago*, 927 F.2d 957 (7th Cir. 1991) 14
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 6, 7
South Dakota v. *Dole* 483 U.S. 203 (1987) 8
Southard v. *Texas Bd. of Criminal Justice*, 114 F.3d 539 (5th Cir. 1997) 18
Thomlison v. *City of Omaha*, 63 F.3d 786 (8th Cir. 1995) 14
Torres v. *Puerto Rico Tourism Co.*, 175 F.3d 1 (1st Cir. 1999) 12
United States v. *Virginia*, 518 U.S. 515 (1996) 17
United States v. *Williams*, 504 U.S. 36 (1992) 11

Constitution and statutes:

U.S. Const.:
Art. I:
§ 8, Cl. 1 (Spending Clause) 5, 8, 9, 10, 13, 15
§ 8, Cl. 3 (Commerce Clause) 9
Amend. I 9, 15
Amend. XI ..... *passim*
Amend. XIV 16
§ 5 (Equal Protection Clause) 16, 17, 18
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d *et seq.* 4
42 U.S.C. 2000d 15
42 U.S.C. 2000d-4a 3, 13
42 U.S.C. 2000d-7 ..... 3, 5, 7, 13, 17
Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 2

Statutes—Continued: Page

Education Amendment of 1972, Tit. IX, 20 U.S.C. 1681 *et seq.* 4, 6
20 U.S.C. 1681(a) 2
20 U.S.C. 1687 ..... 3, 13, 14
20 U.S.C. 1687(1)(A) 12, 14
20 U.S.C. 1687(2)(A) 14
Equal Access Act, 20 U.S.C. 4071 *et seq.* 16
Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1845 3
Rehabilitation Act of 1973, 29 U.S.C. 794 *et seq.*:
§ 504, 29 U.S.C. 794 ..... 4, 10, 13
§ 504(a), 29 U.S.C. 794(a) 3
§ 504(b), 29 U.S.C. 794(b) 13
20 U.S.C. 1403 7
28 U.S.C. 2403(a) 5

Miscellaneous:

S. Rep. No. 64, 100th Cong., 2d Sess. (1987) 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 186 F.3d 544. The opinion of the district court (Pet. App. 27-55) is reported at 5 F. Supp. 2d 366.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1999. The petition for a writ of certiorari was filed on October 5, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title IX of the Education Amendments of 1972 prohibits any "education program or activity receiving Federal financial assistance" from "subject[ing any

person] to discrimination" on the basis of sex. 20 U.S.C. 1681(a). Individuals have a private right of action for damages against entities receiving federal funds that violate this prohibition. See *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992); *Cannon* v. *University of Chicago*, 441 U.S. 677, 705-706 (1979). In the context of sexual harassment by an employee of the recipient, a plaintiff can recover money damages if she can show actual knowledge of the alleged discrimination by an official with authority to take corrective action and deliberate indifference to that discrimination. See *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

In 1984, this Court held that only the "program or activity" that actually received federal funds was governed by Title IX's nondiscrimination requirement. See *Grove City College* v. *Bell*, 465 U.S. 555, 573-574 (1984). In response to *Grove City*, Congress engaged in extensive hearings and deliberations that culminated in the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28. That statute defined the term "program or activity" in Title IX to mean, in relevant part,

> all of the operations of —
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of this title), system of vocational education, or other school system;

* * * * *

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operations would not be consistent with the religious tenets of such organization.

20 U.S.C. 1687. Similar definitions were added to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-4a, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), which prohibit discrimination by programs or activities that receive federal financial assistance on the basis of race and disability, respectively.

In 1985, this Court held that an analogous statutory provision that prohibited discrimination on the basis of disability by programs receiving federal funds (Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a)) was not clear enough to evidence Congress's intent to authorize private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003,

100 Stat. 1845. Section 2000d-7 provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C. 6101 *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

2. Because of the procedural posture of this case, which arises from petitioner's appeal of a refusal to grant its motion to dismiss respondent's complaint, the facts alleged in the complaint must be taken as true. Petitioner is a state-operated university that accepts federal financial assistance. Pet. App. 3. Respondent Litman, a student, was sexually harassed and stalked by her computer science professor. *Id.* at 3-4. In February 1996, she filed a complaint with petitioner's Equity Office. *Id.* at 4. The office ordered the professor to avoid contact with respondent, but it refused to investigate the complaint further. *Ibid.* Finding this response inadequate, respondent sought intervention of higher officials, but petitioner failed to undertake any further investigation. *Ibid.* Other professors refused to interact with her once it had become known that she had filed a sexual harassment complaint against one of the faculty members. *Ibid.* Respondent alleges that in retaliation for her complaint two professors charged her with sexually harassing them. *Ibid.* Based on the professors' complaints, petitioner expelled respondent,

and then held a hearing on her charges against the professor. *Ibid.* Petitioner found that the professor had not violated its sexual harassment policy, but had failed to live up to the "standards" related to that policy. *Id.* at 30.

Respondent filed a complaint alleging, *inter alia*, that petitioner had violated Title IX. Petitioner moved to dismiss the claims on the ground that the Eleventh Amendment barred the claims. The United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the abrogation of Eleventh Amendment immunity. The district court denied the motion to dismiss the Title IX claims, concluding that petitioner had waived its Eleventh Amendment immunity when it continued to accept federal funds after the effective date of 42 U.S.C. 2000d-7. Pet. App. 43-50.

3. Petitioner took an interlocutory appeal of the denial of Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The court of appeals affirmed. Pet. App. 1-26. It held that Title IX is a valid exercise of Congress's power under the Spending Clause to attach conditions to the grant of federal funds. *Id.* at 13. The court articulated five conditions that must be met for a statute to be valid Spending Clause legislation: (1) the exercise of the spending power must be for the general welfare; (2) it must be "unambiguously" clear that conditions are attached to the federal funds; (3) the conditions must have "some relationship" to the federal spending; (4) the money and the conditions may not violate any independent constitutional prohibition; and (5) the financial inducement must not be "so coercive as to pass to the point at which pressure turns into compulsion." *Id.* at 15-16.

Because petitioner did not contend that Title IX failed to meet the "general welfare," "some relationship," and "coercion" requirements, the court of appeals did not address them. Pet. App. 16. The court rejected petitioner's claim that the statute is ambiguous, holding that "any state reading § 2000d-7(a)(1) in conjunction with 20 U.S.C. § 1681(a) would clearly understand the following consequences of accepting Title IX funding: (1) the state must comply with Title IX's antidiscrimination provisions, and (2) it consents to resolve disputes regarding alleged violations of those provision in federal court." *Id.* at 19. The court stated that petitioner's argument that Congress cannot condition the receipt of federal funds on the waiver of Eleventh Amendment is "without merit under current Supreme Court jurisprudence," because "conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity." *Id.* at 20 (citing *Alden* v. *Maine*, 119 S. Ct. 2240, 2267 (1999) ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits.")).

ARGUMENT

The court of appeals' ruling that petitioner was not immune under the Eleventh Amendment to private suits alleging violations of Title IX of the Education Amendment of 1972, 20 U.S.C. 1681 *et seq.*, is correct and consistent with the decisions of this Court and every other court of appeals that has addressed the question. Accordingly, further review is unwarranted.

1. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that the question whether Congress has removed Eleventh Amendment immunity in particular

legislation contains two elements: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' * * * and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)).

The petition for certiorari does not argue that Congress did not clearly express its intention in 42 U.S.C. 2000d-7 to condition the receipt of federal funds on the recipient's waiver of its Eleventh Amendment immunity to Title IX suits.[1] Instead, petitioner contends (Pet. 11-25) that principles of federalism prohibit Congress from conditioning the disbursement of federal funds on a State's agreement to waive its Eleventh Amendment immunity to suits brought to secure compliance with the nondiscrimination promise it made when it accepted the funds.

As petitioner concedes (Pet. 23), States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2226 (1999); *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883). Petitioner nonetheless argues (Pet. 19-20 n.15) that requiring States to

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[1] The courts of appeals that have addressed the issue agree with the panel in this case (Pet. App. 17-19) that the language of 42 U.S.C. 2000d-7 is sufficient to put recipients on notice that acceptance of federal funds constitutes a waiver of Eleventh Amendment immunity. See *Sandoval* v. *Hagan*, 197 F.3d 484 (11th Cir. 1999); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (addressing same language in 20 U.S.C. 1403); *In re Innes*, 184 F.3d 1275, 1282-1283 (10th Cir. 1999) (dictum). But see *Amos* v. *Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212, 230-231 (1999) (Williams, J., dissenting), vacated for rehearing en banc, No. 96-7091(4th Cir. Dec. 28, 1999).

waive their Eleventh Amendment immunity as a condition of receiving federal funds is "never" constitutional because immunity is a "fundamental aspect of sovereignty." But petitioner does not dispute that in electing to whom it disburses federal funds, Congress may place conditions on recipients that it could not impose unilaterally. See *College Savs. Bank*, 119 S. Ct. at 2231; *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987). And this Court has consistently upheld Congress's power to condition the receipt of federal funds on the recipient State's taking actions that affect its "sovereign interests" in enacting legislation. "Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices." *New York* v. *United States*, 505 U.S. 144, 167 (1992). Thus, in *New York*, this Court held that a statute in which Congress conditioned grants to the States upon the States' "regulating pursuant to federal standards" was "well within the authority of Congress" under the Spending Clause. *Id.* at 169, 173; see also *South Dakota* v. *Dole*, 483 U.S. at 210 (assuming that Constitution vested authority over drinking age solely in the States, Congress could condition the receipt of federal money on State's enacting legislation setting drinking age); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (Congress could condition the receipt of federal money on appointment by State of non-partisan disbursement officials).

Nor is there anything unique about the Eleventh Amendment that would bar Congress from conditioning its largesse on a waiver of Eleventh Amendment immunity. Indeed, in *Alden* v. *Maine*, 119 S. Ct. 2240, 2267 (1999), this Court specifically noted that "the Federal Government [does not] lack the authority or means to

seek the States' voluntary consent to private suits. Cf. *South Dakota* v. *Dole*, 483 U.S. 203 (1987)." Similarly, in *College Savings Bank*, this Court reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), that Congress could condition the exercise of one of its Article I powers (the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 119 S. Ct. at 2231. At the same time, the Court suggested that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Id.* at 2231; see also *id.* at 2227 n.2. This Court explained that unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and spend money constitutes the granting of a "gift" on which Congress may place reasonable conditions that a State is free to accept or reject. *Id.* at 2231.

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden*, 119 S. Ct. at 2264, it is perfectly appropriate to permit each State to make its own cost-benefit analysis and determine whether to accept the federal money with the condition that it can be sued in federal court, or forgo the federal funds. See *New York*, 505 U.S. at 168; *Metropolitan Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271 (1991). But once that choice is made, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983). All the courts of appeals that have addressed the issue, both before and after *College Savings Bank*, have held that so long as

Congress has made its intentions clear, Congress has the power to condition the receipt of federal funds on a state recipient's waiver of Eleventh Amendment immunity.[2] Further review of this issue is not warranted.

2. Petitioner also argues (Pet. 15-25) that even if Congress may condition the receipt of federal funds on a waiver of immunity in some instances, Congress exceeded its authority under the Spending Clause by requiring the entire State to waive its Eleventh Amendment immunity to suits under Title IX if the State elected to receive any federal funds. That argument is not properly presented because it was not pressed or passed on below, because it relies on a mistaken construction of the statutory provisions at issue, and because it is contrary to this Court's settled

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[2] See *Sandoval* v. *Hagan*, 197 F.3d 484 (11th Cir. 1999) (Title VI of the Civil Rights Act of 1964); *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 757 (8th Cir. 1999) (Individuals with Disabilities Education Act); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (same); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504 of the Rehabilitation Act), cert. denied, 118 S. Ct. 2340 (1998); *Department of Educ.* v. *Katherine D.*, 727 F.2d 809, 818-819 (9th Cir. 1983) (Education for All Handicapped Children Act of 1975), cert. denied, 471 U.S. 1117 (1985); *Scanlon* v. *Atascadero State Hosp.*, 735 F.2d 359, 361-362 (9th Cir.) (Section 504 of the Rehabilitation Act), rev'd due to the absence of a clear statement, 469 U.S. 1032 (1984); *Florida Nursing Home Ass'n* v. *Page*, 616 F.2d 1355, 1363 (5th Cir. 1980) (Medicaid), rev'd due to the absence of a clear statement *sub nom. Florida Dep't of Health & Rehabilitative Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); see also *Premo* v. *Martin*, 119 F.3d 764, 770-771 (9th Cir. 1997) (State's participation in Randolph-Sheppard Vending Stand Act constitutes a waiver of Eleventh Amendment immunity), cert. denied, 522 U.S. 1147 (1998); *Delaware Dep't of Health & Soc. Servs.* v. *Department of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (same).

precedent upholding Title IX as valid Spending Clause legislation.

First, petitioner did not argue below that the breadth of the waiver required by Title IX exceeded Congress's authority. As the court of appeals noted, petitioner did "not contend * * * that the prohibition of discrimination and the accompanying waiver of Eleventh Amendment immunity are not reasonably related to grants of education funds; or that the attachment of conditions to the funding arrangement is coercive." Pet. App. 16; see also *id.* at 47, 49 (district court notes that "Title IX and § 2000d-7 easily satisfy [the relatedness] requirement, and Defendant does not argue otherwise" and "Defendant does not argue that the financial inducement[s] provided by federal monies offered under Title IX funding are so great as to be coercive"). Thus, the court of appeals did not address the contours of the "relatedness" or "coercion" doctrines, or apply them to the circumstances of this case.

This Court's general rule is that it will not grant certiorari to address arguments not pressed in, or decided by, the lower courts. See *United States* v. *Williams*, 504 U.S. 36, 42 (1992); *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 237 (1990). Since this is a court of "review, not one of first view," *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457 (1995), the failure of petitioner to press these arguments below denies this Court "the benefit of a well-developed record and a reasoned opinion on the merits." *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 80 (1988). Petitioner suggests (Pet. 15 n.13) that because Eleventh Amendment immunity can be raised at any stage of the proceedings, this Court should ignore this rule. But this Court's rule is based not on the power of the Court to hear a case and address arguments not previously raised, but on

practical grounds concerning which cases present appropriate vehicles to address such arguments. This Court has applied this prudential rule even when the question involves the Eleventh Amendment. See *Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997) (declining to address Eleventh Amendment argument "which w[as] neither raised nor decided below, and w[as] not presented in the petition for certiorari"); see also *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 8 n.12 (1981) (petition raised Eleventh Amendment issue; Court would not address it because it was not "within the scope of the questions on which review was granted"); cf. *Torres* v. *Puerto Rico Tourism Co.*, 175 F.3d 1, 4-5 (1st Cir. 1999) (that appeal involves Eleventh Amendment claims does not allow State to ignore rules of appellate procedure).

The value of having the lower courts address questions in the first instance is evidenced in this case, where petitioner's arguments are premised on a particular interpretation of a statutory provision that the lower courts were not given an opportunity to accept or reject. Petitioner asserts (Pet. 15-16, 19) that 20 U.S.C. 1687(1)(A), which provides that the Title IX's nondiscrimination prohibition applies to "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government * * * any part of which is extended Federal financial assistance," means that the entire State must comply with Title IX if any agency of the State accepted any federal funds. But the language of the statute cannot support such a reading. As the text makes clear, the operations of the "department, agency * * * or other instrumentality of a State" are covered if "any part" of that department or agency "is extended Federal financial assistance"; the text does not state or

imply that the entire state government is covered if any part of any state entity accepts federal funds.

Petitioner does not explain how the statutory language can be read to require it to make the all-or-nothing choice it describes. Instead, petitioner relies (Pet. 13-14) on the Eighth Circuit's interpretation of similar language in *Bradley* v. *Arkansas Department of Education*, 189 F.3d 745 (1999). After the petition for certiorari was filed in this case, however, the Eighth Circuit vacated the portion of the *Bradley* decision addressing the Spending Clause issue—the portion on which petitioner relies—and granted our petition for rehearing en banc with respect to that issue.[3] *Jim C.* v. *Arkansas Dep't of Educ.*, No. 98-1830EALR, 1999 WL 1209784 (Dec. 14, 1999). One of the bases for our petition for rehearing en banc in *Bradley* was our contention that the panel's discussion of the scope of the waiver required of recipients of federal funds was simply a misreading of the statute's plain language.[4]

Petitioner's proposed reading of the statute is contrary to the interpretation of every other court of appeals that has addressed the issue, each of which has concluded that coverage under this subsection extends only to the "agency" or "department" that accepted the federal funds. See, *e.g.*, *Association of Mexican-American Educators* v. *California*, 195 F.3d 465, 474-475 (9th

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[3] The United States intervened in *Bradley* to defend the constitutionality of Section 2000d-7.

[4] *Bradley* involved Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. The substantive nondiscrimination obligations of Section 504, like those of Title IX, apply only to a "program or activity receiving Federal financial assistance." The term "program or activity" is similarly defined in both statutes. Compare 29 U.S.C. 794(b) with 20 U.S.C. 1687; see also 42 U.S.C. 2000d-4a (same for Title VI of the Civil Rights Act of 1964).

Cir. 1999); *Nelson* v. *Miller*, 170 F.3d 641, 653 n.8 (6th Cir. 1999); *O'Connor* v. *Davis*, 126 F.3d 112, 117 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998); *Lightbourn* v. *County of El Paso*, 118 F.3d 421, 426-427 (5th Cir. 1997), cert. denied, 522 U.S. 1052 (1998); *Schroeder* v. *City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991).[5] Thus, the premise of petitioner's argument regarding the meaning of this provision of the statute is simply erroneous.

Petitioner's failure to present its argument earlier also deprived the parties and the lower courts of the opportunity to identify which provision of 20 U.S.C. 1687 triggered coverage of petitioner. In our view, this case does not involve subsection (1)(A) at all, because petitioner is clearly covered under subsection (2)(A). That subsection provides that "all the operations" of "a college, university, or other postsecondary institution, or a public system of higher education" are covered by Title IX if "any part" is extended federal financial assistance. 20 U.S.C. 1687(2)(A). In this case, it is uncontested that petitioner is a "university" that receives federal financial assistance. See Pet. App. 3 ("[T]he parties agree that GMU is a recipient of federal education funding within the meaning of Title IX."), 17 ("GMU acknowledges that it voluntarily accepts Title

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[5] Prior to the now-vacated panel opinion in *Bradley*, the Eighth Circuit itself had recognized that "[f]or State and local governments, only the department or agency which receives the aid is covered." *Klinger* v. *Department of Corrections*, 107 F.3d 609, 615 (8th Cir. 1997) (quoting S. Rep. No. 64, 100th Cong., 2d Sess. 4 (1987)); accord *Thomlison* v. *City of Omaha*, 63 F.3d 786, 789 (8th Cir. 1995) ("Because the definition of program or activity covers all the operations of a department, here the Public Safety Department, and part of the Department received federal assistance, the entire Department is subject to the Rehabilitation Act.").

IX funding."). Thus, petitioner's complaint about the alleged breadth of another subsection of the definition of "program or activity" is irrelevant, because petitioner is covered under this alternative provision. Cf. *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (declining to address facial validity of Spending Clause provision when it was clear that it was valid as applied).

There can be no doubt that Congress, under the Spending Clause, can require a university that elects to receive federal financial assistance to promise not to discriminate on the basis of sex in any of its operations. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Court interpreted Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, to prohibit a school district from ignoring the disparate impact its policies had on limited-English proficiency students. It held that Title VI, as interpreted, was a valid exercise of the Spending Power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." *Id.* at 569 (citations omitted). The Court reached a similar conclusion in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX infringed on the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.* at 575; cf. *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991) (Congress may constitutionally require that an entity that receives federal funds not engage in conduct Congress does not wish to subsidize so long as recipient may restructure

its operations to separate its federally-supported activities from other activities).[6]

More recently, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq.*, which prohibits any public secondary schools that receive federal financial assistance and maintain a "limited open forum" from denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (citation omitted). Similarly, compliance with Title IX and waiver of its sovereign immunity is the price a university must pay if it elects to remain federally funded.

3. Even if petitioner's arguments concerning waiver were correct, Congress validly abrogated petitioner's Eleventh Amendment immunity pursuant to its power under Section 5 of the Fourteenth Amendment to

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[6] Contrary to petitioner's suggestion (Pet. 16), the Constitution does not require that Congress must provide funds for the "enforcement of federal anti-discrimination law" if it wishes to impose a nondiscrimination requirement. In neither *Lau* nor *Grove City* was there any suggestion that the federal funds received were targeted towards alleviating discrimination. In fact, it is clear that the financial assistance at issue in *Grove City* was simply general financial aid, and had no relationship to programs to combat sex discrimination. 465 U.S. at 559, 565 n.13.

enforce the Equal Protection Clause. See *College Sav. Bank*, 119 S. Ct. at 2206 ("'[A]ppropriate' legislation pursuant to the Enforcement Clause of the Fourteenth Amendment could abrogate state sovereignty."); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).

As petitioner concedes (Pet. 27-28), every court of appeals that has addressed Congress's power to abrogate state sovereign immunity from suits under Title IX has upheld Section 2000d-7 as a valid exercise of Congress's Section 5 authority. See *Franks* v. *Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *Doe* v. *University of Ill.*, 138 F.3d 653, 660 (7th Cir. 1998), vacated and remanded, 119 S. Ct. 2016 (1999), reinstated in pertinent part, No. 96-3511, 1999 WL 1257383 (7th Cir. Dec. 23, 1999); *Crawford* v. *Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); see also *Lesage* v. *Texas*, 158 F.3d 213, 217 (5th Cir. 1998) (same holding for Title VI), rev'd and remanded on other grounds, 120 S. Ct. 467 (1999).

Nonetheless, petitioner claims (Pet. 26-28) that these decisions have all been undermined by this Court's decision in *College Savings Bank* because (petitioner asserts) that case requires a pattern of constitutional violations by States before Congress can abrogate Eleventh Amendment immunity. But, unlike the statute at issue in *College Savings Bank*, which was directed at unremedied patent infringements, the nondiscrimination prohibition of Title IX is based on a long history of unconstitutional sex discrimination by States. In *J.E.B.* v. *Alabama*, 511 U.S. 127 (1994), this Court concluded that "'our Nation has had a long and unfortunate history of sex discrimination,' a history which warrants the heightened scrutiny we afford all gender-based classifications today." *Id.* at 136 (citation omitted); see also *United States* v. *Virginia*, 518 U.S. 515,

531-532 (1996). This Court itself has determined that women "have suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history." *J.E.B.*, 511 U.S. at 136. No additional legislative inquiry on the scope of the problem is necessary for statutes involving sex discrimination. See also *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 n.10 (1982) ("History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function."). A statute that prohibits sex discrimination, a form of discrimination that this Court has found to be widespread, invidious, and often unconstitutional,[7] clearly falls within Congress's "wide latitude in determining" whether a statute is appropriate remedial legislation. *College Savings Bank*, 119 S. Ct. at 2206 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)).

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[7] The courts of appeals are in agreement that sexual harassment is a kind of sex discrimination that can violate the Equal Protection Clause. See, *e.g.*, *Pontarelli* v. *Stone*, 930 F.2d 104, 114 (1st Cir. 1991); *Gierlinger* v. *New York State Police*, 15 F.3d 32, 34 (2d Cir. 1994); *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990); *Beardsley* v. *Webb*, 30 F.3d 524, 529 (4th Cir. 1994); *Southard* v. *Texas Bd. of Criminal Justice*, 114 F.3d 539, 550 (5th Cir. 1997); *Poe* v. *Haydon*, 853 F.2d 418, 429 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989); *Bohen* v. *City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986); *Headley* v. *Bacon*, 828 F.2d 1272, 1274-1275 (8th Cir. 1987); *Bator* v. *Hawaii*, 39 F.3d 1021, 1027-1028 (9th Cir. 1994); *Johnson* v. *Martin*, 195 F.3d 1208, 1216-1217 (10th Cir. 1999); *Cross* v. *Alabama*, 49 F.3d 1490, 1503 (11th Cir. 1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2000

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No. 99-596

In the
Supreme Court of the United States

George Mason University,

Petitioner,

v.

United States of America and Annette Greco Litman,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE and BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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23 pp

MOTION FOR LEAVE TO FILE BRIEF A*MICUS CURIAE*

Pursuant to Supreme Court Rule 37, the Center for the Original Intent of the Constitution respectfully submits this motion for leave to file the attached brief *amicus curiae* in support of the petition for writ of *certiorari*. Written consent for *amicus* participation in this case was granted by counsel for the petitioners and counsel for the United States and lodged with the Clerk of this Court.

Counsel for Respondent Annette Greco Litman responded to our request for consent as follows:

> We fail to see how the Home School Legal Defense Association, which has home schools as members, would have any standing whatsover to deal one way or another with the issues of federal aid to state colleges or gender discrimination in public schools.
>
> Therefore, we would object to your request to participate as amicus in this case.

Letter from Alan Banov, Counsel for Annette Litman, to Scott Somerville, Home School Legal Defense Association (Nov. 16, 1999) (on file with Clerk of the Supreme Court).

Attorney Banov seems to confuse "standing," which we lack, with "interest," which we do not. The Center for the Original Intent of the Constitution operates under the auspices of Patrick Henry College. Patrick Henry College, in an effort to preserve its independence, refuses to accept any federal funding. Patrick Henry's mission statement clearly

states, "No direct or indirect governmental funding of any kind will be accepted."

Our interests go beyond how this case may affect our future funding, however. We follow a standard of patriotism set in the Virginia ratification debates by George Mason (after whom the university in this case is named) and Patrick Henry (after whom our own college is named). Mason and Henry distrusted centralized power. Though both men strongly favored union with the other States, they feared that an overly-strong federal government could ultimately devour the sovereignty of Virginia. James Madison, chief architect of the Constitution, responded to those fears by spelling out the limits on the new central government. But he did not ask Mason and Henry to simply take his word for it. He asked them—and all his countrymen—to *hold* the federal government to that word. Madison said:

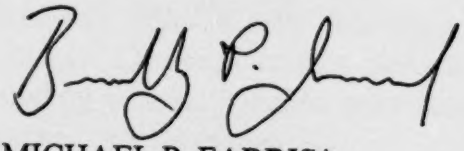
> I know this government will be cautiously watched. The smallest assumption of power will be sounded in alarm to the people, and followed by bold and active opposition. I hope that my countrymen will keep guard against every arrogation of power.

Jonathan Elliot, Debates on the Adoption of the Federal Constitution, Vol. 3, p.206-7 [hereinafter, Elliot's Debates].

Today, 211 years after the Virginia ratification debates, this *amicus* seeks to help hold the federal government to the terms of Madison's promise. Madison drafted a Constitution that was intended to preserve the blessings of liberty for himself *and* his posterity. We, as heirs of that liberty, seek to sound the alarm when liberty is threatened.

For these reasons, the Center respectfully requests that this Court grant its motion for leave to file the attached brief *amicus curiae*.

Respectfully Submitted,



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DECEMBER, 1999

QUESTION PRESENTED

George Mason University is an agency of the Commonwealth of Virginia, and Virginia insists that it has not waived its sovereign immunity from this Title IX suit. The Fourth Circuit ruled that even though Congress cannot abrogate immunity through the Spending Clause, Virginia contracted away its rights when it accepted federal money.

Question presented: Did the founding generation intend to give Congress the power to invade the residuary sovereignty of State governments by tying otherwise unconstitutional federal demands to "general welfare" spending?

TABLE OF CONTENTS

Motion for Leave to File Brief A*micus Curiae* ii

Question Presented v

Table of Contents vi

Table Of Authorities vii

Interest of the *Amicus* 1

ARGUMENT The Founding Generation Would Not Have Ratified the Constitution If They Thought Sovereignty Could Be Lost Through Spending 4

A. James Madison Promised Virginia That Federal Spending Would Be Limited 4

B. Alexander Hamilton Promised New York That Sovereignty Would Be Secure 9

Conclusion 14

TABLE OF AUTHORITIES

Cases

Alden v. Maine,
199 S.Ct. 2240 (1999)..... 1, 9, 12

College Savings Bank v Florida Prepaid,
119 S. Ct. 2219 (1999)..... 9

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976)..... 12

Florida Prepaid v. College Savings Bank,
119 S. Ct. 2199 (1999)..... 9

Litman v. George Mason University,
186 F.3d 544 (4th Cir. 1999)..... 3

Reno v. Condon,
No. 98-1464 (U.S. argued Nov. 10, 1999)..... 1

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996)..... 8, 12

South Dakota v. Dole,
483 U.S. 203 (1987)..... 13

United States v. Butler,
297 U.S. 1 (1936)..... 13

Statutes

Civil Rights Remedies Equalization Act,
42 U.S.C. § 2000d..... 4, 14

Other Authorities

William Jackson, History of the American Nation (1911).....10

Constitutional Provisions

U.S. Const. Art. IV, § 4, cl. 1 2

U.S. Const. Preamble 2

Founding Documents

Jonathan Elliot, Debates on the Adoption of the Federal Constitution (2d ed. 1863) .....passim

The Federalist No. 33 (A. Hamilton) (J. Hamilton ed. 1869).....9, 11

INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the founders is the only safe basis for the preservation of limited government and all rights including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

In our first brief, we argued that principles of *dual sovereignty*, implicit in the structure of the Constitution, prohibited Congress from abrogating state sovereign immunity in state courts. *Alden v. Maine*, 199 S.Ct. 2240 (1999). In our second brief, we argued that dual sovereignty prohibits Congress from directly regulating state governments through the Commerce Clause. *Reno v. Condon*, No. 98-1464 (U.S. argued Nov. 10, 1999). In this brief, we argue that our Founders did not intend to give Congress the power to spend unenumerated funds in a manner that both intrudes upon a state's general police powers and conditions the outlay of funding on a state's waiving its sovereign immunity.

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[1] This brief was not authored in whole or in part by counsel for any party. It has been funded in its entirety by the *amicus curiae*. No person or entity has made a monetary contribution specifically for the preparation or submission of this brief. *See* Sup. Ct. Rule 37.6.

The *amicus curiae* requested the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. *See* Sup. Ct. Rule No. 37.3(a). Counsel for Annette Greco Litman refused consent, and a motion for leave to file has therefore been submitted.

Our Constitution guarantees a republican form of government in every State. U.S. Const. Art. IV, § 4, cl. 1. In light of the never-ending accumulation of federal power, however, and the increasing irrelevance of state and local governments, we fear that this constitutionally-guaranteed government is an endangered species. We seek to save it.

This Court has yet to indicate just how the Guarantee Clause is to be enforced. In the absence of any clear judicial remedy, the best we know how to do is to engage in consistent, passionate advocacy for the original intent of the Constitution.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because they are ancient and deserve veneration, but because they made promises which "we the people" still rely upon. Those promises are what is ultimately at stake in this case.

SUMMARY OF THE ARGUMENT

The Circuits are split on the question of whether Congress can make states waive all sovereign immunity as a condition of receiving federal funds. Our Founders were never split on this issue. James Madison viewed this as a simple question with only one possible right answer: Congress can only spend money under its *enumerated* powers.

The Fourth Circuit suggests—and we agree—that this Court's precedents are out of step with the original intent of the Constitution. As Judge Niemeyer said:

> If the Supreme Court were one day to adopt a Madisonian construction of the Spending Clause, perhaps Congress would be inhibited from implementing a spending program that both intruded upon a state's general police powers and conditioned the outlay of funding on a state's waiving its sovereign immunity. In deciding this case, however, we are bound by the Court's existing constructions of the scope of Congress' spending power.

Litman v. George Mason University, 186 F.3d 544, 556 (4th Cir. 1999) .

The Fourth Circuit interprets existing precedent to say that Virginia made a bargain with the federal government, and by so doing has lost its sovereign immunity. Virginia *has* made a bargain, but it is not the one the Fourth Circuit identified. Virginia made its bargain 212 years ago, when it entered into a compact with twelve other States to establish a *limited* federal government with *enumerated* powers. That is the bargain that controls this case. That is the bargain this Court must enforce.

ARGUMENT

THE FOUNDING GENERATION WOULD NOT HAVE RATIFIED THE CONSTITUTION IF THEY THOUGHT SOVEREIGNTY COULD BE LOST THROUGH SPENDING

The Fourth Circuit ruled that Virginia bargained away its sovereign immunity when it continued to accept federal funding after Congress amended Title IX by adding the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7(a)(1). That court suggests that James Madison would not tolerate such a result, but implies that Alexander Hamilton would. As we will show, neither Madison nor Hamilton would permit such an invasion of residuary sovereignty.

A. JAMES MADISON PROMISED VIRGINIA THAT FEDERAL SPENDING WOULD BE LIMITED

Money is power, and our Constitution was designed to limit power. That is why our Founders took such pains when it came to money. For example, there were passionate arguments at the Constitutional Convention against giving the federal government any power to tax. Richard Henry Lee, of Virginia, saw the potential for danger:

> Mr. LEE, in answer to Mr. Madison, said...it was an established truth that the purse ought not to be put into the same hands with the sword.... He said, it had been urged by several in behalf of such an establishment for public credit, that without it Congress was nothing more than a rope of sand. On this head he would be explicit; he had rather see Congress a rope of sand than a rod of iron.

5 Elliot's Debates, *supra*, 56-57.

The "purse" and "sword" meant much to the founding generation. Under English constitutional law, Parliament held the power of the purse, while the King wielded the sword. Taxes were idealized as the people's gift to the crown; which is why colonists were so outraged when taxes were imposed on colonies that had no members in Parliament. The slogan, "No Taxation Without Representation," may have sparked a revolution, but it was in no way revolutionary. Lovers of English liberty had learned—the hard way—to keep a jealous watch over the power of the purse.

Virginia would not have ratified the Constitution without repeated assurances that the power to spend would not be abused. Madison led the effort to get Virginia to ratify the Constitution, while Patrick Henry and George Mason used all their rhetorical powers to defeat it. Over and over again, those ardent Virginia patriots pointed to the dangers of unlimited government lurking within the "Necessary and Proper Clause" and the "General Welfare Clause." *See, e.g.*, 3 Elliot's Debates, *supra*, 149-50; 423; 436-38; 441; 455. Madison rose to rebut their claims:

> I shall take notice of what the honorable gentleman said with respect to *the power to provide for the general welfare*. The meaning of this clause has been perverted, to alarm our apprehensions. The whole clause has not been read together. It enables Congress "to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States." The plain and obvious meaning of this is, that no more duties, taxes, imposts,

> and excises, shall be laid, than are sufficient to pay the debts, and provide for the common defence and general welfare, of the United States.

3 Elliot's Debates, *supra*, 207 [*emphasis supplied*].

Three years after the Constitution was ratified, Madison further clarified his view on federal spending. In a debate on the Cod Fishery Bill, in 1792, Madison explained why it was unconstitutional for the federal government to pay out "general welfare" money for unenumerated purposes:

> It is supposed, by some gentlemen, that Congress have authority not only to grant bounties in the sense here used, merely as a commutation for drawback, but even to grant them under a power by virtue of which they may do any thing which they may think conducive to the general welfare! This, sir, in my mind, raises the important and fundamental question, whether the general terms which have been cited are to be considered as a sort of caption or general description of the specified powers; and as having no further meaning, and giving no further powers, than what is found in that specification, or as all abstract and indefinite delegation of power extending to all cases whatever—to all such, at least, as will admit the application of money—which is giving as much latitude as any government would well desire.

4 Elliot's Debates, *supra*, 427.

Madison's point in the Cod Fishery debate was not to express his own opinions (significant as those might be to our interpretation of the Constitution today), but to remind his hearers that the Constitution was only ratified because the States *believed* the federal government had a limited power to spend:

> I, sir have always conceived—I believe those who proposed the Constitution conceived—it is still more fully known, and more material to observe, that *those who ratified the Constitution conceived*—that this is not an indefinite government, deriving its powers from the general terms prefixed to the specified powers—but a limited government, tied down to the specified powers, which explain and define the general terms.

4 Elliot's Debates, *supra*, 427-28 [*emphasis supplied*].

Madison's conviction on this point never wavered. Forty-one years after the Constitution was ratified, Madison still continued to insist that ours is a *limited* government, and that this limitation applies specifically to the ability of Congress to use its power to tax and spend. Madison still pointed to the Virginia debates for proof of that point. In 1830, he wrote:

> Consider, for a moment, the immeasurable difference between the Constitution, limited in its powers to the enumerated objects, and expanded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two constitutions, of characters essentially contrasted with each other; the one possessing powers confined to

> certain specified cases, the other extended to all cases whatsoever. For what is the case that would not be embraced by a general power to raise money, a power to provide for the general welfare, and a power to pass all laws necessary and proper to carry these powers into execution—all such provisions and laws superseding, at the same time, all local laws and constitutions at variance with them? Can less be said, with the evidence before us furnished by the Journal of the Convention itself, than that it is impossible that such a constitution as the latter would have been recommended to the states by all the members of that body whose names were subscribed to the instrument?

Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), *reprinted in* 4 Elliot's Debates, *supra,* 613-14.

The Fourth Circuit treated this as a contract case, in which Virginia entered into an enforceable contract with the federal government when it accepted federal funds. Under a Madisonian view of spending, the federal government could only enter into a binding contract if it was spending money pursuant to its enumerated powers. Any other spending would be *ultra vires.* It cannot constitute "consideration" for a contract that takes away the reserved powers of the States.

Thus, Congress cannot spend money to accomplish a purpose by attaching "strings" to a spending bill if it cannot accomplish that same purpose through direct regulation. This Court has made it abundantly clear that Congress cannot use Article I power to abrogate state sovereign immunity directly. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44

(1996); *Alden v. Maine*, 119 S. Ct. 2240 (1999); *College Savings Bank v Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999); *Florida Prepaid Postsecondary Educa. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999). It may not use spending power to do so indirectly.

B. ALEXANDER HAMILTON PROMISED NEW YORK THAT SOVEREIGNTY WOULD BE SECURE

The Fourth Circuit suggests that Virginia cannot win this case unless this Court adopts a "Madisonian" view of spending, but Alexander Hamilton would disagree. Hamilton never suggested that Congress' could invade the reserved powers of the States through federal spending. To the contrary: he argued that such acts would be "acts of usurpation." The Federalist No. 33, at 226 (A. Hamilton) (J. Hamilton ed. 1869).

Hamilton's public statements about "usurpation" determine this issue, not his personal opinions about spending. To understand the different impact of his public and private views, we must recall the two primary reasons to examine the views of our Founders in any constitutional debate.

First, we may find that the Founders' *personal* views on the issues of the day help us grasp shades of meaning that we would otherwise miss. Such insights are like the "persuasive precedent" of a court opinion from another jurisdiction. But a second, more significant reason for considering the views of the Founders is to discern the meaning of terms that the members of the ratifying conventions expressly had in mind when they ratified the constitutional contract. Without our Founders' solemn assurances on precise points, we would

not have this Constitution today. We should therefore treat those promises with all the force of "binding precedent."

Hamilton's public statements matter because his role in "selling" the Constitution to the citizens of New York cannot be overestimated. As one historian says:

> In the New York campaign, which followed the Constitutional convention, Hamilton seems to have been everywhere and everybody. His work in this contest can never be exaggerated. The people of New York were opposed to the new Constitution, the politicians were against it, and the task of inducing the Empire State to adopt the new instrument seemed hopeless. The Constitutional convention at the beginning was nearly two-thirds against the proposed measure. Yet in face of all these odds, Hamilton led his forces to victory. He threw himself into the fight body, mind and soul and by a display of oratory, parliamentary skill, personal magnetism, tact and judgment he overcame opposition and had the Convention adopt the Constitution by a majority of three.

8 William Jackson, History of the American Nation, p.2330 (1911).

Hamilton made solemn promises to the citizens of New York. He addressed their fears by insisting that the federal government could never invade the residuary sovereignty of the States. He expounded a concept that this Court has since labeled *dual sovereignty*. As he put it:

> If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY. But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely *acts of usurpation*, and will deserve to be treated as such.

Federalist No. 33, at 226 [*emphasis supplied*].

Hamilton took his stand for dual sovereignty in the New York Ratification Debates, saying:

> [The opponents of the Constitution argue] that the laws of the United States are supreme and that where there is one supreme there can not be a concurrent authority; and further, that where the laws of the Union are supreme those of the States must be subordinate, because there can not be two supremes. This is curious sophistry. That two supreme powers can not act together is false. They are inconsistent only when they are aimed at each other or at one indivisible object. The laws of the United States are supreme as to all their

> proper constitutional objects; the laws of the States are supreme in the same way. These supreme laws may act on different objects without clashing, or they may operate on different parts of the same common object with perfect harmony. Suppose both governments should lay a tax of a penny on a certain article; has not each an independent and uncontrollable power to collect its own tax? The meaning of the maxim, there can not be two supremes, is simply this—two powers can not be supreme over each other.

2 Elliot's Debates, *supra*, at 355-56.

According to Hamilton, two "supreme powers" are inconsistent only when they are aimed at each other or at one indivisible object. There is no inconsistency when two governments each levy a tax of one penny, nor is there any inherent inconsistency if two government each spend a million dollars for the same purpose. But in this case, there would be an inconsistency: the federal government says that Virginia can be sued in federal court, but Virginia says it cannot. According to Hamilton's logic, one or the other OF THESE powerS must have the final say on sovereign immunity.

This Court has recently ruled that the State, not the federal government, has the final say on sovereign immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 119 S. Ct. 2240 (1999). The only exception to this rule is when Congress acts pursuant to its powers under the Enforcement Clause of the Fourteenth Amendment. *See*, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). As Justice Kennedy put it:

> When a "Law...for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions...it is not a "Law...proper for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserves to be treated as such."

Alden, 119 S. Ct. at 2256, *citing Printz v. United States*, 521 U.S. 898, 924 (1997).

This Court's New Deal jurisprudence has made much of a "Hamiltonian" view of spending. *See, United States v. Butler*, 297 U.S. 1 (1936). *Butler* concluded, "The power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money." *Butler*, 297 U.S. at 88. This Court upheld such conditional giving, over the objections of South Dakota (and Justices Brennan and O'Connor), in *South Dakota v. Dole*, 483 U.S. 203 (1987).

Under the "Hamiltonian" view of spending upheld in *Butler*, the federal government can make a sovereign State jump through federal hoops if it wants its full share of federal money. Congress can place conditions on its gifts. But, as any first year law student must learn, a "conditional gift" is not a "contract." A State can accept a "gift" without losing its freedom. But a "contract" binds it.

Hamilton's *personal* views on federal spending would permit conditional giving. Madison's would not. But Hamilton's personal views matter little in this case. New York ratified the Constitution on the basis of Hamilton's *public* assurances about the limits of federal power. We dare not

break faith with the generation that took Hamilton at his word to pursue some "Hamiltonian" concept of spending.

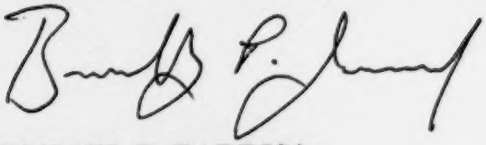
CONCLUSION

James Madison promised Virginia that federal power was *limited* in the Virginia Ratification Debates 1788. The power to spend, Madison insisted, was limited to certain *enumerated* powers. Alexander Hamilton may have had a broader view of federal power, but he promised New York that it would not invade the residuary sovereignty of the States. Relying on these express assurances, Virginia became the tenth State to ratify the Constitution, and New York became the eleventh.

The Fourth Circuit treated the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d, as a binding contract between the Commonwealth of Virginia and the United States. James Madison would disagree. Spending outside of Congress' enumerated powers is *ultra vires*, and cannot form the basis of a binding contract. Even under a "Hamiltonian" view of spending that allows for conditional gifts, a *gift* cannot take away the sovereign immunity of an unconsenting State.

If there is a contract that must be honored in this case, it is the contract that was established between "we the people" of the Commonwealth of Virginia and the rest of the Union in 1788. The Fourth Circuit has set aside that solemn compact to honor a hypothetical "deal" that allegedly came into existence when Virginia accepted federal money with strings attached. That cannot be correct. This Court should grant *certiorari* in this case.

Respectfully Submitted,



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REPLY

BRIEF

Supreme Court, U.S.
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In The

Supreme Court of the United States

GEORGE MASON UNIVERSITY,

Petitioner,

v.

UNITED STATES OF AMERICA and
ANNETTE GRECO LITMAN,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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150A

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE PETITION 2

I. THE WRIT SHOULD BE GRANTED TO RESOLVE THE INHERENT CONFLICT WITHIN THIS COURT'S JURISPRUDENCE ... 2

II. REGARDLESS OF WHETHER THE REQUIRED WAIVER OF SOVEREIGN IMMUNITY APPLIES TO ALL ASPECTS OF STATE GOVERNMENT OR SIMPLY TO ALL OPERATIONS OF THE UNIVERSITY, THE ISSUE OF WHETHER CONGRESS CAN USE THE SPENDING CLAUSE POWER TO REQUIRE WAIVER OF A STATE'S SOVEREIGN IMMUNITY WARRANTS REVIEW BY THIS COURT 6

III. BECAUSE CONGRESS' ATTEMPT TO ABROGATE THE SOVEREIGN IMMUNITY OF THE STATES FOR TITLE IX CLAIMS IS UNCONSTITUTIONAL, THERE IS NO ALTERNATIVE GROUND FOR THE LOWER COURT'S DECISION 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine
119 S. Ct. 2240 (1999) 4

Atascadero State Hospital v. Scanlon
473 U.S. 234 (1985) 5

Bradley v. Arkansas
189 F.3d 745 (8th Cir. 1999)
rehearing granted in part sub nom., Jim C. v. Arkansas Dep't of Educ.,
___ F.3d ___, 1999 WL 1209784 (8th Cir. Dec. 14, 1999) 1, 2, 6

California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.
445 U.S. 97 (1980) 3

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Fund
119 S. Ct. 2219 (1999) 5

Coyle v. Smith
221 U.S. 559 (1911) 4

Davis v. Monroe County Bd. of Educ.
119 S. Ct. 1661 (1999) 9

Florida Prepaid Post Secondary Educ. Expense Bd. v. College Savings Bank
119 S. Ct. 2199 (1999) 8

Garcia v. San Antonio Metropolitan Transit Authority
469 U.S. 528 (1985) 5

Kimel v. Florida Bd. of Regents
120 S. Ct. ___, 2000 WL 141012 (2000) 1, 8

TABLE OF AUTHORITIES – Continued

Page

Metcalf & Eddy v. Mitchell
269 U.S. 514 (1926) 5

New York v. United States
505 U.S. 144 (1992) 4

North Carolina ex rel. Morrow v. Califano
445 F. Supp. 532 (E.D. N.C. 1977),
aff'd mem., 435 U.S. 962 (1978) 3

Oklahoma v. United States Civil Service Comm'n
330 U.S. 127 (1947) 3

Printz v. United States
521 U.S. 898 (1997) 4

Sandoval v. Hagan
197 F.3d 484 (11th Cir. 1999),
petition for rehearing filed (11th Cir. Dec. 21, 1999) 2

Seminole Tribe v. Florida
517 U.S. 44 (1996) 1, 5

South Dakota v. Dole
483 U.S. 203 (1987) 3, 9

Steward Machine Co. v. Davis
301 U.S. 548 (1937) 3

Tafflin v. Levitt
493 U.S. 455 (1990) 5

United States v. Butler
297 U.S. 1 (1936) 9

United States v. Lopez
514 U.S. 549 (1995) 4

CONSTITUTIONAL PROVISIONS

U.S. Const. amend XXI, § 2 3

TABLE OF AUTHORITIES – Continued

Page

STATUTES

20 U.S.C. § 1687(1)(a) 6

42 U.S.C. § 2000d-7 ..... *passim*

OTHER AUTHORITIES

Petition for Rehearing and Petition for Rehearing En Banc by the United States as Intervenor, Jim C. v. Arkansas Dep't of Educ., No. 98-1830 (8th Cir. Oct. 28, 1999) 4

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

George Mason University, by and through its counsel, the Attorney General of the Commonwealth of Virginia, files this Reply Brief in support of its Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

As an initial matter, the University wishes to advise the Court of three recent developments affecting this Petition. First, on January 11, 2000, this Court ruled that Congress' attempt to abrogate sovereign immunity for Age Discrimination in Employment Act claims was invalid. *See Kimel v. Florida Bd. of Regents*, 120 S. Ct. ___, 2000 WL 141012 (2000). In doing so, this Court stated "Congress' powers under Article I of the Constitution do not include the power to subject States to suits at the hands of private individuals." *Id.* at ___. This statement, which is simply a reaffirmation of the holding of *Seminole Tribe v. Florida*, 517 U.S. 44 (1995), contradicts the holding of the lower court. The lower court held that Congress *could* use its Article I Spending Clause power to exact a waiver of sovereign immunity.

Second, on December 14, 1999, the U.S. Court of Appeals for the Eighth Circuit granted rehearing *en banc* on that portion of the panel opinion in *Bradley v. Arkansas*, 189 F.3d 745 (8th Cir. 1999) holding that 42 U.S.C. § 2000d-7 is unconstitutional to the extent that it requires a State to waive sovereign immunity as a condition of receiving federal funds under the Rehabilitation Act. *See Jim C. v. Arkansas Dep't of Educ.*, ___ F.3d ___, 1999 WL 1209784 (8th Cir. Dec. 14, 1999). As explained in the

Petition, the *Bradley* panel opinion was directly contrary to the judgment below and, thus, created a split in the circuits. By granting rehearing *en banc*, the Eighth Circuit has obviated the conflict among the courts of appeal at least for the moment. Of course, if the full Eighth Circuit reaches the same result as the panel, the conflict among the courts of appeal will be restored and will be more serious.

Third, on November 30, 1999, the U.S. Court of Appeals for the Eleventh Circuit upheld 42 U.S.C. § 2000d-7 to the extent that it requires the States to waive their sovereign immunity as a condition of receiving federal funds under Title VI. *See Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *petition for rehearing filed* (11th Cir. Dec. 21, 1999).

REASONS FOR GRANTING THE PETITION

I. THE WRIT SHOULD BE GRANTED TO RESOLVE THE INHERENT CONFLICT WITHIN THIS COURT'S JURISPRUDENCE.

In opposing the Petition, the Respondents implicitly demonstrate why the Petition should be granted. By focusing on the fact that the lower court's decision is consistent with this Court's Spending Clause decisions and ignoring the fact that it is inconsistent with this Court's federalism jurisprudence, the Respondents illuminate the inherent conflict within this Court's jurisprudence. This Court should grant review in order to reconcile this inherent conflict.

The terms of the conflict are clear. As the National Government's brief demonstrates, this Court's Spending Clause decisions can be interpreted as allowing Congress to force the States to surrender some of their "sovereign interests" as a condition of receiving federal funds. (U.S. Resp. at 8-11.) For example, although Section 2 of the Twenty-first Amendment, U.S. Const. amend XXI, § 2, "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system," *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980), this Court found that Congress could force the States to change their drinking age as a condition of receiving federal funds. *See South Dakota v. Dole*, 483 U.S. 203, 208 (1987). Similarly, this Court held that Congress could condition the receipt of federal funds on the agreement of the State to appoint non-partisan persons to certain positions. *See Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 143 (1947). *See also North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532 (E.D. N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978) (summarily affirming a decision upholding a requirement that the States create a particular State agency as a condition of receiving federal funds). If Congress can require the States to give up their sovereign powers to regulate alcohol, to choose who will be their public employees, and to determine how their government is organized, then the Spending Clause power is almost plenary in nature.[1]

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[1] Although this Court's decisions have suggested that some conditions may be so coercive as to be unconstitutional, *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937), the National Government has stated that "when it comes to the relationship

In contrast, this Court's recent federalism decisions significantly limit the power of the National Government to disrupt the sovereignty of the States. As this Court observed:

> Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.

Alden v. Maine, 119 S. Ct. 2240, 2268 (1999). For example, the National Government cannot commandeer local law enforcement officials to enforce *federal* law. *See Printz v. United States*, 521 U.S. 898 (1997). Similarly, the National Government cannot force a State to adopt specific state legislation, *see New York v. United States*, 505 U.S. 144 (1992), or dictate the location of the seat of government, *see Coyle v. Smith*, 221 U.S. 559, 565 (1911). Moreover, although the National Government has broad power over interstate and international commerce, some activities are beyond the scope of the commerce power and, thus, may be regulated only by the States. *See United States v. Lopez*, 514 U.S. 549 (1995). Finally, in the sovereign immunity

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between a State and the United States, 'coercion' is a concept not capable of judicial enforcement." *See Petition for Rehearing and Petition for Rehearing En Banc by the United States as Intervenor, Jim C. v. Arkansas Dep't of Educ.*, No. 98-1830 (8th Cir. Oct. 28, 1999) at 8.

context, Congress may not use the Commerce Clause to abrogate sovereign immunity, *see Seminole*, 517 U.S. at 44, and may not require the States to waive sovereign immunity as a condition of engaging in interstate commerce, *see College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Fund*, 119 S. Ct. 2219 (1999). Indeed, this Court has recognized that "[t]he 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.' " *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 547 (1985) (Powell, J., dissenting)). *See also Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government"); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926) ("[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers").

In sum, under this Court's current jurisprudence, the ability of the National Government to regulate the States using Article I powers depends upon which Article I power is invoked. If Congress attempts to use an Article I power other than the Spending Clause, the attempt to regulate is invalid. In contrast, if Congress uses the Spending Clause and simply attaches conditions to the receipt of federal funds, then the attempt is valid. This inconsistency regarding the scope of Article I powers must be resolved. Accordingly, this Court should grant the Writ.

II. REGARDLESS OF WHETHER THE REQUIRED WAIVER OF SOVEREIGN IMMUNITY APPLIES TO ALL ASPECTS OF STATE GOVERNMENT OR SIMPLY TO ALL OPERATIONS OF THE UNIVERSITY, THE ISSUE OF WHETHER CONGRESS CAN USE THE SPENDING CLAUSE POWER TO REQUIRE WAIVER OF A STATE'S SOVEREIGN IMMUNITY WARRANTS REVIEW BY THIS COURT.

Although 42 U.S.C. § 2000d-7 reads "a *State* shall not be immune" and although 20 U.S.C. § 1687(1)(a) defines "program" as all operations of the State, the National Government insists that the waiver of sovereign immunity does not apply to the entire Commonwealth of Virginia. Rather, the required waiver of sovereign immunity is limited to all operations of George Mason University. (U.S. Resp. at 13-16.) By taking this position, the National Government implies that the breadth of the required waiver has constitutional significance. Presumably, a requirement that one state agency waive sovereign immunity for particular claims is more acceptable than a requirement that the State waive sovereign immunity for a variety of claims if it receives federal funds for a specific purpose. *See Bradley*, 189 F.3d at 758 (upholding a requirement that the State waive sovereign immunity for claims under the Individuals with Disabilities Education Act but invalidating a requirement that the State waive sovereign immunity for claims under the Rehabilitation Act).

However, this distinction is meaningless. The University believes that, regardless of breadth or the amount of

money involved, *all* requirements that a State waive sovereign immunity as a condition of receiving federal funds are unconstitutional. A requirement that a single office of a single agency waive sovereign immunity for a single claim is just as offensive as a requirement that the entire state government waive sovereign immunity for all classes of claims.

Nevertheless, if this distinction has constitutional significance, then it is inapplicable in the present case. The statute requires George Mason University, an institution with more than 20,000 students and a budget in excess of $300 million, to waive sovereign immunity for broad classes of claims if one part of the University receives a single dollar of federal funds. Thus, if an assistant professor in the law school receives a federal grant, the University loses its sovereign immunity defense to frivolous claims from undergraduates. Moreover, given the dependence of many students on federal financial assistance, it is completely unrealistic for any institution of higher education to forgo federal funds. While there may be situations where the required waiver is narrow and directly related to the purpose for which federal money is given, the requirement that large universities waive sovereign immunity or lose all federal money is not such an instance.

In sum, the breadth of the waiver does not diminish the exceptional importance of the issue. Regardless of whether the waiver is confined to the University or applies to all aspects of State government, this Court should decide the constitutionality of such waivers. Accordingly, the Writ should be granted.

III. BECAUSE CONGRESS' ATTEMPT TO ABROGATE THE SOVEREIGN IMMUNITY OF THE STATES FOR TITLE IX CLAIMS IS UNCONSTITUTIONAL, THERE IS NO ALTERNATIVE GROUND FOR THE LOWER COURT'S DECISION.

Finally, the Respondents argue that the decision below is justified on alternative grounds. Specifically, the Respondents may assert that § 2000d-7 constitutes a valid abrogation of sovereign immunity for various federal statutes. If Congress properly has abrogated sovereign immunity, there is no reason to take up the issue of whether Congress could require waiver as a condition of receiving federal funds.

As explained in more detail in the Petition, this argument is simply wrong. Quite simply, the attempted abrogation of sovereign immunity cannot pass the standard set out by *Florida Prepaid Post Secondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999), and reaffirmed by *Kimel*. First, Congress did not make findings of a specific pattern of violations of the Fourteenth Amendment by the States. Second, even if there were such findings, the response of abrogating sovereign immunity for all claims arising under various federal statutes is not proportionate to any purported constitutional violations. *See Florida Prepaid*, 119 S. Ct. at 2210. Accordingly, § 2000d-7 is unconstitutional to the extent that it purports to abrogate sovereign immunity for various federal claims.

Since there is no alternative basis for the judgment, the issue of whether Congress may require a State to waive its sovereign immunity as a condition of receiving

federal funds is squarely before this Court. Accordingly, this Court should grant the Petition for a Writ of Certiorari.

CONCLUSION

At the end of the day, "[i]f the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' " *Dole*, 483 U.S. at 217 (O'Connor, J., joined by Brennan, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)) (internal quotation marks original). Indeed, under the lower court's view of our Constitution, the Spending Clause may be used "to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1677 (1999) (Kennedy, J., joined by Rehnquist, C.J., Scalia, and Thomas, JJ., dissenting). This Court must articulate clear limits on the Spending Clause power. Accordingly, this Court should **GRANT** the Petition for a Writ of Certiorari.

Respectfully submitted this 14th day of January 2000.

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